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TRIAL

OF
Captain THOMAS GREEN
and his Crew,

Pursued before the Judge of the
High Court of *Admiralty* of
SCOTLAND; And the As-
sessors appointed by the Lords
of Privy Council,

At the Instance of
Mr. ALEXANDER HIGGINS Advocat, Procurator-Fiscal to the
said Court,

FOR
Piracy, Robbery, & Murder.

Faithfully Extracted from the Records of the said Court, and other
Authentick Documents.

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Published by Authority.

EDINBURGH,

Printed by the Heirs and Successors of *Andrew Anderson*, Printer
to the Queens most Excellent Majesty, Anno DOM. 1705.

THE
T R Y A L

Caplain THOMAS GREEN

and his crew

Partied before the Judge of the

High Court of Admiralty of

SCOTLAND, and the At-

torneys appointed by the Lords

of the Admiralty

At May 15, 1900.

THE PROSECUTION

BY THE ATTORNEY GENERAL

AND BY THE ATTORNEY GENERAL

AND BY THE ATTORNEY GENERAL

AND BY THE ATTORNEY GENERAL

The Preface.

THE Tryal and Process against Captain Thomas Green, Commander of the English East-India Ship called the Worcester, and his Crew, now to be published, hath been the Subject of so much Discourse, and such various Reflections both in Scotland and England, that there appears nothing more just and expedient, than that the World should have a true and impartial Account of it.

The Ship called the Annandale, belonging to the Company of Scotland trading to Africa and the Indies, having been seized in the Downs in England, at the Instance, and by the special Order of the English East-India Company; The said Company of Scotland did judge themselves injured by the said Seizure; And therefore when the said Ship the Worcester, an English East-India Trader, came to Scotland, and to the Road of Leith, about the Month of August last, The Scots Company, by virtue of the Powers, contained in the Act of Parliament in their favour, and their Patent under the Great-Seal, did seize her and her Cargo by way of Reprisal; And having seized her and her Lading, only in order to a fair Tryal, they raised a civil Action before the Admiralty of Scotland, for declaring the said Seizure lawful on the Account above-mentioned.

Upon this Seizure, and while this civil Pursuit was in dependance, several things broke out, tending to a greater and far different Discovery. For 1. Captain David Monro being, immediately after the Seizure, placed by those employed by the African Company, for securing of the Worcester, just by the Hammock where Simpson the Gunner went to sleep, Captain Monro perceived the Gunner to be uneasy, and that he could take no rest, as supposing that the Ship had been seized upon some other Account than that of Reprisal, which moved the Gunner to question Captain Monro very earnestly, whether or not the Seizure was not made on some other Account, and if there was not a Design upon their Lives? Which Solitude of the Gunner, gave the first rise to the Suspicion that ensued.

Within a day or two thereafter, the Carpenter Henry Keigle and Andrew Robertson the Gunners Mate, happening to discourse about their Wages, Keigle was anxious to go ashore, whereto Robertson answering, that he would take his Hazard and stick by the Ship while there was any hope; Keigle replied to him in Passion, — Damn you, you never wrought so as to deserve Wages out of any thing aboard the Ship; To which Robertson replying, that he wrought the Work that he was hired for; Keigle flew out extravagantly, and abusing Robertson with his Tongue to the last Degree, Robertson made no Return, but pausing and walking up and down the main Deck very pensive, was (after a heavy Groan or two) heard by several credible Witnesses present, to utter these Words as to himself. This is the just Judgment of God upon us, for the Wickedness committed in our last Voyage; and I'm afraid it will still pursue us further, since that, being reduced to so small a Number aboard, four or five of us cannot agree amongst our selves.

A day or two thereafter, when the Ship the Worcester was got within the Heads of Bruntisland Harbour, and that those aboard were drinking heartily a Bowl of Punch in the main Cabine, one belonging to the Scots Company being present, happened to discourse of Captain Gordon Commander of Her Majesties Frigate the Royal Mary, what a Scourge he had been to the small French Privateers upon the East Coast of Scotland: George Haines one of Captain Green's Crew, a little warm with the

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the Punch, broke out in the hearing of several Scots Gentlemen, as well as of several others of Green's Crew, and slantingly said with an Oath, that our Sloop (meaning Green's Sloop) was more terrible upon the Coast of Malabar, than ever Captain Gordon was or will be to the French Privateers on the Coast of Scotland; For a better Sailer than that Sloop never carried Canvas; Or Words to this Effect.

The Gentleman of the Scots Company, who was present, finding Mr. Haines in the foresaid Humour, takes Occasion to ask him, Whether, in their Voyage Outward or Inward, they had met with, or heard any thing of, or concerning two Scots Ships, that went on a Trading Voyage beyond the Cape, both belonging to the Scots Company; The one commanded by Captain Drummond, and the other by Captain Steuart: Haines Answered, That they had heard of them, but did not see them; But, adding, said, Its no great Matter, you need not trouble your self about them, for I believe you will not see them in haste: To which the other asking, What might be the Reason, and Haines shifting; Haines said at length, He heard they were turned Pirates, and that one of them had Eight Guns, and the other Twelve or Fourteen, to the best of his Memory.

But sometime thereafter, George Haines falling into Acquaintance with a Young Woman at Burntisland, to whom he made Love; He then began to discover the Secrets he had concealed: Which was also the Occasion of the Examination afterwards made in the Tryal of the foresaid Young Woman, and several others, as may be seen in the Process.

But this is certain, that Haines his free Discoursing with this Young Woman coming to take Vent, Simpson, Keigle and Robertson, all of Captain Green's Crew, and then aboard, threatened Haines most severely for it, and made him deal and prevail with her, not only not to discover any further what he had told her, but likeways to deny what he had really told to her and several others: After which, Haines and the Young Woman became both so shy and close, that they spoke no more of these Matters, until they were brought before the Committee of Council.

However Captain Green and his Crew became so Jealous of Haines, that at length, by George Kitchin and Thomas Whitehead, they perswaded him to make his Escape; And had so far prepared for it, that Horses were Hired to carry all the Three to Kinghorn, where they were to cross privately to Leith: But, when the Horses were ready Sadled, one George Ker, and some other Gentlemen then at Burntisland, getting notice of what was designed, laid hold upon the said Haines, and obliged him to go again aboard the Ship.

In the Civil Process depending before the Judge of the Admiralty, the Judge, upon a Representation made to him, gave Order, That Search should be made for such Documents, as the Scots Company might have use for in proving some Points of their Claim; Such as these, That the Ship belonged to England, and the East-India Company there, &c. And albeit this was endeavoured by Captain Green and his Crew to be prevented, by putting several of their Papers out of the way; Yet there were found in the Journals such Extraordinary Instructions given by the Owners and Freighters to the Captain and Supercargo, as to write under Covert of a certain Cypher, and to convey their Letters in so Secret a Manner, with several other Circumstances of that Kind, as did greatly increase the Suspitions already given, that Captain Green and his Ship were no Fair and Lawful Adventurers, but, from the beginning, might be designed for Ill Practices.

Daniel Stringman the Cook belonging to the said Ship the Worcester, but who was taken up at Bengal some Moneths after Captain Green had left the Coast of Malabar, happening one Day to drop some Things he had heard to Simpson the Gunner, which did not please him and others of the Crew; They were at pains to perswade him to make his Escape, as if they had been resolved to escape with him: Stringman gets ashore, and waiting till it grew Dark at Night, Travels all alone

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to the Queensferry, where he crossed to the other side, but one Mr. Hepburn being then aboard, and missing Stringman, took Horse immediately to Kinghorn and Kirkaldy, and then to Queensferry, searching for him, and getting notice at the Queensferry that he had crossed there, he follows Stringman with all diligence, and overtaking him at the West-end of Newhaven, carries him back to Bruntisland.

And a few Weeks thereafter, breaks out the Discovery: For, about the middle of December, Stringman addressed himself to the said Mr. Hepburn thus: Sir, It was not you, but God Almighty that brought me back, that I should tell you the Truth: And then, after some Preface, Stringman tells Hepburn what Discourse he had overheard sometime before, between the two Blacks belonging to Green's Crew, viz. Antonio Ferdinando Stringmans own Mate, and Antonio Francisco Captain Green's Servant; And how that having urged his Mate to tell him plainly all that past betwixt them, Antonio Ferdinando, with much ado, revealed to him the whole matter of Captain Greens Piracy, Robbery and Murder, committed upon the Coast of Malabar, as it stands fully declared, and oft repeated in the ensuing Process.

These were the true Steps of the first Discovery of this Matter, all ready to be attested by persons above Exception; Wherein it is manifest, That one Occurrent led on to another, until the Period of the Discovery above remarked, without any formed Design or Management upon any mans part.

Thereafter an Affidavit was taken before the Baillies of Bruntisland, of what Stringman and the Blacks had declared, which gave rise, upon due Information, for the Order that was given to make Captain Green and all his Crew Prisoners, which was executed accordingly: And then the Matter being brought before the Lords of Her Majesties Privy Council, and they justly judging that it deserved a strict and impartial Inquiry, Committees were appointed, and Examinations taken, and Reports made: Whereupon their Lordships did Ordain, that Captain Green and his Crew should be brought to a legal Tryal before the Judge of the Admiralty.

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T H E
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O F

Captain THOMAS GREEN and his Crew, &c.

THE Lords of Her Majesties Privy Council having taken Precognition of the Grounds of the foregoing Information against Captain *Thomas Green*, and others of his Crew; They thought fit, and Ordered, That the said Captain *Thomas*, &c, should be put to a Trial upon the Crimes informed, before the Judge of the High Court of Admiralty. As also, the Lords of Privy Council thought fit at the same time, to Appoint Assistants to the Procurator-Fiscal of the High Court of Admiralty, for the better Ordering and Managing of the said Tryal, according to the Tenor of their Act following,

AT Edinburgh the Thirteenth day of February 1705 Years. Committee anent Captain *Green* and his Crew, Sederunt Lord Chancellor, Marquess of Annandale, Earls of Haddingtoun, Leven, Ruglen, Lords Yester, Beilhaven, Advocat, Thesaurer-deput, Anstruther, Sir John Home, and Ormiston younger. Its the Opinion of the Committee, That my Lord Chancellor should Writ to Court for Remissions to Charles May Chyrurgeon, Antonio Ferdinando Cooks Mate, Antonio Francisco Captains Man, George Hains Steward, George Glen Quarter-master, Alexander Taylor Fore-mast-man; And that the Tryal against Captain *Green* and his Crew should be Pursued before the Admiral Court, and that Assessors should be Named to the Judge, and Assistants to the Procurator Fiscal, Sic Subscribitur TWEEDDALE Cancel. I. P. C. The above Report of the Committee anent Captain *Green* Commander of the Ship the Worcester, being, upon the Day and Date of these presents, read in presence of the Lords of Her Majesties Privy Council, the samen was Voted and Approven. And the said Lords did thereby nominat and appoint Sir James Steuart Her Majesties Advocat, Sir David Dalrymple, and Mr. William Carmichael Her Majesties Solicitors, Sir Patrick Home, Sir Gilbert Eliot, Mr. Alexander Macleod, and Mr. Francis Grant, to be Assistants to Mr. Alexander Higgins Procurator-Fiscal to the Admiral Court, in prosecuting the Libel and Indictment to be given at his instance, against the said Captain *Green* and his Crew before the Admiral Court, to the final End and Decision thereof: And the said Lords declared, that they would next Council day Name Five of their own Number to be Assessors to the Judge of Admiralty, during the dependance of the foresaid Procefs: And recommended to the Lords of Thesaury to pay the Lawyers that are employed to be Assistants accordingly. Extracted by me.
GILB. ELIOT. Cls. Sti. Concilii

Whereupon the Judge of the High Court of Admiralty did present to the Lords of Council, a Petition, That since the Trial was ordered to be made before him, of the foresaid Crimes informed against Captain *Green* and his Crew, and that the matter appeared to be of great Importance, he might have, according to Custom in the like Cases, Assesors appointed and joyned with him by the Authority of Council, for his Assistance in the said Trial.

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AND

AND the Lords of her Majesties Privy Council, having considered the above Petition, and the samen being read in their presence; The said Lords did Nominate and Appoint the Earl of Loudoun, Lord Beilhaven, Lord Arnistoun, Sir John Home of Blackadder, and John Cockburn younger of Ormiston, to be Assessors to the Petitioner, and assist and vote with him in the Tryal, at the Procurator-fiscals Instance against Captain Thomas Green, Commander of the Ship the Worcester, and others of his Ships Crew, before the said high Court of Admiralty, for their being guilty of Piracy and other Crimes, and that to the final End and Decision thereof.

Follows the Court of Justiciary of the High Court of Admiralty, with the whole Tryal, as it proceeded before the Judge of the said Court, and the Assessors above-appointed.

CURIA JUSTICIARIA supremæ Curia

Admiralitat tentata in Prætorio, vel nova Sessionis Domo Burgi de Edinburgo, quinto die Mensis Martii 1705. per Judicem dictæ Curia, & per honoratissimos Viros Joannem Comitem de Loudoun, Joannem Dominum de Beilhaven, Dominos Robertum Dundas de Arnistoun, Joannem Home de Blackadder, & Joannem Cockburn de Ormiston Assessores.

Curia Legitimè affirmatâ.

The said day, the said Earl of Loudoun, Lord Beilhaven, &c. produced the Act of her Majesties Privy Council above-mentioned, appointing them to be Assessors to the said Judge.

Thereafter the said Assessors took the Oath of Alledgiance and signed the same, with the Assurance, and took the Oath *de fidei administratione*, and were thereupon admitted and received.

Intran.

Captain Thomas Green Commander of the Ship called the Worcester, now in Bruntisland Harbour.

Captain John Madder chief Mate of the said Ship.

John Reynolds second Mate of the said Ship.

Thomas Linstead Assistant to the deceased Supercargo of the said Ship.

James Burn Boat-swain of the said Ship the Worcester.

James Simpson Gunner.

Andrew Robertson Gunners-mate.

John Bruckly Seaman.

George Kitchen Seaman.

Henry Keigle Carpenter.

Samuel Urlines his Mate.

George Haines Steward of the said Ship.

Daniel Stringman Cook.

Samuel Wilcocks Chyrurgeons-mate.

George Glen Seaman there.

Henry Burns Seaman there.

Alexander Taylor Seaman there.

And John Bannantyne Seaman there.

All of them Indicted and Accused at the instance of Mr. *Alexander Higgins* Advocat Procurator-Fiscal to the high Court of Admiralty, for the Crimes of *Piracy, Robbery and Murder*, in manner mentioned in the two several Indictments raised against them thereanent, and whereof the Tenor follows. Captain *Thomas Green* Commander of the Ship called the *Worcester*, now in *Bruntisland* Harbour, Captain *John Madder* chief Mate of the said Ship, *John Reynolds* second Mate of the said Ship, *Thomas Linsteed* Assistant to the deceased Supercargo of the said Ship, *James Burn* Boat-swain of the said Ship, *James Simpson* Gunner of the said Ship, *Andrew Robertson* Gunners-mate, *John Brucklie* Seaman there, and *George Kitchen* Seaman there, all Prisoners; You, and ilk one of you are accused and indicted at the instance of Mr. *Alexander Higgins* Advocat, Procurator-fiscal to the high Court of Admiralty, of the Crimes of *Piracy, Robbery and Murder*, in manner after-mentioned. viz. That by the Law of GOD, the Laws of Nations, of this, and of all well governed Realms, the Crimes of *Piracy, Robbery and Murder*, are prohibite, under all highest Pains; And that by the Laws of this Realm, the saids Crimes are prohibite under pain of Death, and escheat of Moveables. Nevertheless it is of Verity; that Captain *Thomas Green* Commander of the Ship called the *Worcester*, now in *Bruntisland* Harbour, and his Crew, are guilty, Art and Part of the saids Crimes, or one or other of the same, in so far as, the said Captain *Thomas* or his said Crew, having sailed from *England* in the said Vessel the *Worcester*, upon pretence of Merchandizing towards the *East-Indies*; The foresaid Captain and his said Crew belonging to the said Vessel, did upon one or other of the days of the Moneths of *February, March, April or May*, in the year 1703, Rencounter, or meet with another Ship or Vessel, sailed by its own Men and Crew, upon the Coast of *Malabar*, near *Cale-cute*, and the said Vessel bearing a red Flag, and having *English* or *Scots* Aboard, at least such as spoke the *English* Language; The said Captain *Thomas Green* and his Crew, after some Intercomuning with them, did without any Lawful Warrant, or just cause, attacque the said other Vessel or Ship, while expecting no such Treatment, and invading her first by their Sloup, which they had manned with Gunns and other Arms for that purpose, they fell upon the said other Vessel in an Hostile manner, by shooting of Gunns and otherways, and after some time spent in fighting against her by their Sloup, and partly by the approaching of the said *Thomas Greens* Ship the *Worcester*, they overcame, and Boarded the said other Vessel, and having seized their Men, they killed them, and threw them over-board, and then carried, or caused carry away the Goods that were aboard the said other Vessel to their said Ship the *Worcester*, and then disposed upon the said Ship, by selling her ashore on the said Coast. Which Crime, being a wicked Piracy committed by surprize in parts so remote, and probably with all the Caution the Committers could use for concealing thereof, and for preventing Discoveries, comes now to be discovered in the several Parts and Circumstances of the Action, and by such as were present thereat; Which being all conjoyned, does make up and inerr the foresaid Crime objected, and are as follows, viz. That the foresaid Rencounter and Fight betwixt Captain *Green* and his Crew and the said Vessel the *Worcester*, and the foresaid other Vessel taken by her, hapned on the said Coast as above: Likewise, at the same time, one or more of the said Ship the *Worcester* her Crew being on Shore, and at some distance from the Sea, heard the said Shooting, which brought the saids persons to the Shore, where they, at least the Chyrurgeon of the said Ship the *Worcester* one of them, saw her riding at a good distance from the Shore upon her Birth (as they speak), and having the other Ship at the Stern, as it were tyed or towed to her, as being the Vessel they had mastered or overcome as said is. Likewise, the said Chyrurgeon did see the Boat belonging to the said Ship the *Worcester* coming a shore from her, and the Chyrurgeon demanding at such of the Crew as were in her,

what had brought them ashore : They answered, that they had been *Bush-
ing* (a Sea-term used for fitting and trimming a Ship for fighting) and that
they had Drunk, Spilt or Staved all their Water, and they were come for a
new Supply ; and when a little time thereafter the said Chyrurgeon went a-
board the said Ship the *Worcester*, he perceived the Deck thereof Lumbered and
covered, and in a confused manner, with Balls, Boxes and Goods; whereof
when he asked the Reason, *John Madder* one of the Pannels, and a princi-
pal Actor in the Engagement, Answered, *Damn you, what have you to do to
Inquire, meddle with your Plaister-Box.* And when the Chyrurgeon went down to
his Station and Chest, he called for one of the Blacks *Antonio Ferdinando*, and
one *Duncan McKay* now dead, and another, in order to dress them; but when
he asked what way they came by their Wounds, they declined to answer;
whereupon the Chyrurgeon refusing to dress them, if they would not tell him
how they got their Wounds, the said *John Madder* came to the Chyrurgeon in
a Passion, and asked what was his business to ask so many Questions, when
he did see the Wounds so plain before him, calling him a Blockhead for not
dressing them ; and at length the Contest was so warm betwixt the said *Mad-
der* and Chyrurgeon, that *Madder* charged him to ask no more Questions, and
he charged the Men wounded, not to answer a word : And further, ordered
him back to the Shore, which the Chyrurgeon was forced to comply with,
where the Chyrurgeon meeting with *Francisco De-olivera* the Linguister, asked
him whether he saw any of the *Worcesters* Men that had carried the foresaid Ship
so taken into *Keilon* River, and the Linguister answered, that he had not,
but that they were some of the *Worcesters* Company, who as soon as they had
brought her in, and made her fast, took their Boat and went directly on
Board : The Ship taken being carried into *Keilon* River as said is, where she
was left with her Yards and Top-masts down, all unrigged, and the said Lin-
guister told the Chyrurgeon further, that one *Coge Commodo* complained he had
bought the said taken Ship too dear, whereby it appears that the said Ship
taken by violence, was sold in manner foresaid. *Likeas*, for further evidence
of the said Piracy, since the time that *John Reynolds* one of the Pannels was
seized with the rest, for his accession thereto, there was found a Letter wrote
to him by one *Sarah Newlands*, bearing Date the 6 *January*, wherein she tells
him, that tho he had been basely wicked, yet she should be sorry to hear he
were guilty of any thing that might bring him to the Gallows ; and therefore
advises him to confess, adding, that in his own Letter which she had seen, he
says, that some of their Men had basely confessed (which says she) implys
that they were guilty ; And when *Reynolds* was questioned upon his Letter, he
acknowledged that he had wrote a Letter to his Wife the said *Sarahs* Sister,
which had occasioned her writing the said Letter to him, and thereupon he
produced the Copy of the said Letter to his Wife, which agrees with what
Sarah says, as the said Copy and *Sarahs* Letter both put in the Clerk of the
Admiralities Hands, to be seen by the Pannels, bear. And further, *George
Haines* one of the Crew of the said *Worcester*, since his coming to *Scotland*, and
when at *Bruntisland*, being asked by one *James Wilkie* Taylor Burgess of *E-
dinburgh*, some day in *October* last, about his Brother *Andrew Wilkie*, who went
Chyrurgeon in Captain *Drummonds* Ship, if ever the said *Haines* had seen the
said *Andrew Wilkie* in his Voyage, he flew in a Passion, and said, *what Devil
was his concern with Captain Drummond?* upon which, *James Wilkie* forbearing
a little till he should be calmer, asked the said *Haines*, whether he had heard
or seen any *Scots* Ships coming to or from the *East-Indies* during their Voyage ?
Haines answered, that when they were upon the coast of *Malabar*, a Dutch
Ship informed them, that one Captain *Drummond*, commanding a *Scots* Ship,
and having a Sloop in Company, was turned Pirat; upon which *Haines* and
they manned their Ship to be in readiness, but saw him not, only a little there-
after

after *Haines* added, that he had in his Custody, the time the said Ship the *Worcester* was seized, which he would not have fallen in the Seizers Hands for twice the Value of the Ship, but that he had thrown it over-board; adding further, that there was still in the Ship what would never be found by the Seizers, unless they pulled her Board from Board, tho he knew where the thing lay. *Likeas*, when after the said *James Wilkies* departure, one *Anna Seaton* in *Bruntisland*, did at his desire further inquire at *Haines* about Captain *Drummonds* Ship; He answered, that he saw they had a design to pump him, but that they should not be the wiser of him: At all which Passages, *Kenneth Mackenzie* Indweller in *Cannongate* was a present witness. And the said *Anna Seaton* did further tell the said *Kenneth Mackenzie*, that when she expostulat with *Haines* for his being in Passion as said is; He answered, that he knew more of Captain *Drummond* than he would tell at that time, and that if the said *Andrew Wilkie* was with Captain *Drummond*, he would not be seen again. And further, the said *Anna Seaton* heard the said *Haines* owne and declare their said Wickedness, and she and *William Wood* one of the Gunners of her Majesties Artillery, with one *John Henderson* Writer in *Edinburgh*, being in September last, in *Anna Seaton's* Mothers House, after having drunk one Health or two; The said *Haines* who was there present, fell in a Melancholly Fit, and exprest himself; *That its a wonder, that since we did not sink at Sea, GOD dath not make the Ground to swallow us up, for the Wickedness that has been committed during the last Voyage on Board of that Old Bitch Bess*, pointing to Captain *Greens* Ship. And further, the said *Haines* said, That if what the said *John Madder* had done in the said Voyage were well known, he deserved as much as his Uncle *Madder* met with at *Amsterdam*, who was there burnt in Oyl, for attempting to burn their Ships. And when at another time, the said *Anna Seaton* told *Haines*, that she had an old Sweet-heart who went away with Captain *Drummond*, and would gladly hear some Tydings, whether he was dead or alive; The said *Haines* who was then a Suiter to *Anna Seaton*, assured her, she would never see him again, if he was in *Drummonds* Ship: And for a further Confirmation of the Truth of the said Piracy, when a Committee of Council was sent to *Bruntisland*, to cause search and unload the said Vessel, it was found by the Skippers and Seamen imployed, that the Goods aboard her were not stow'd as Merchant Goods used to be, but were found in the Hold in such confusion, as if taken by Piracy, and no otherways. *Likeas*, when the said Ship the *Worcester* was seized, the said *John Madder* being questioned about Captain *Drummonds* Ship, he took out of his Pocket, or at least shewed in his hand, the Seal of the *African Company*, which he could never lawfully have got. By all which, they being joyned and connected together (as a Discovery of such a Wickedness practised in such remote Parts, and so industriously and obstinately endeavoured to be concealed, deserves to be) the same, in all the Points and Circumstances thereof, at least such, and so many of them as are relevant, and are offered to be proven by a cumulative Probation, do plainly amount to such a plenary Evidence, as may fully convince all impartial Men, that the foresaid Captain *Green* and his said Crew, are all and each of them guilty, Art and Part of the foresaid Crimes of Piracy, Robberie and Murder, or one or other of them above charged; which being found by a Verdict of one Assize before the Judge of the Admiralty, and the Lords Assessors appointed by the Lords of Privy Council, the forenamed persons, and each of them ought to be punished by Sentence of the said Court, with the pain of Death, and Confiscation of their Moveables, to the Example and Terror of others, to do or commit the like in time coming.

Additional Conclusion to the Indictment at the Instance of Mr. Alexander Higgins Procurator-fiscal to the Court of Admiralty, against Captain Green, &c.

viz. **T**HAT the Conclusion of the said Indictment given on *Saturday*, the seventeenth Instant, bearing the pain of Death and of Escheat and Confiscation of Moveables, should extend to the Escheat and Confiscation of the said Ship and Cargo, by reason of the foresaid Crime of Piracy; and that the said Captain *Thomas Green*, &c. should answer to the foresaid Conclusion, as thus explained, and extended to the Confiscation of the said Ship and Cargo, as in the case of Piracy, the foresaid 5 of *March*, which is the day of compearance assigned to the said Pannels, or at least upon the 6, 7, 8, or 9 days of *March* thereafter, as the true Import, or at least a clear Consequent of the foresaid Crime and Indictment given thereupon; The List of Witnesses and Assizers remaining the same, as subjoyned to the foresaid principal Indictment, *Sic subscribitur* ALEXANDER HIGGINS.

The other of the saids Indictments is as follows

HENRY Keigle Carpenter in the Ship called the *Worcester*, now in *Bruntisland* Harbour, *Samuel Urlines* his Mate, *George Haines* Steward of the said Ship, *Daniel Stringman* Cook in the said Ship, *Samuel Wilcocks* Chyrurgeonsmate, *George Glen* Seaman there, *Henry Barns* Seaman there, *Alex. Taylor* Seaman there, & *John Bannantine* Seaman there, all of Captain *Tho. Green* Commander of the said Ship his Crew, You, and ilk one of you, are accused and indicted at the instance of Mr. *Alexander Higgins* Advocat, Procurator-fiscal to the High Court of Admiralty, of the Crimes of Piracy, Robberie and Murder, in manner after-mentioned. *viz.* That by the Law of GOD, the Laws of Nations, of this, and of all other well governed Realms, the Crimes of Piracy, Robberie and Murder, are prohibite under all highest Pains; And that by the Laws of this Realm, the saids Crimes are prohibite, under pain of Death, and Escheat of Moveables. Nevertheless, it is of Verity, that Captain *Thomas Green*, Commander of the Ship called the *Worcester*, now in *Bruntisland* Harbour, and his Crew, are guilty, Art and Part of the saids Crimes, or one or other of the samen, in so far as the said Captain *Thomas*, or his said Crew, having sailed from *England* in the said Vessel the *Worcester*, upon pretence of Merchandizing towards the *East-Indies*, the foresaid Captain and his said Crew belonging to the said Vessel, did upon one or other of the days of the Moneths of *February*, *March*, *April*, or *May*, in the year 1703, Rencontre and meet with another Ship, or Vessel, sailed by its own Men and Crew, upon the coast of *Malabar* near *Calecute*; and the said Vessel bearing a Red Flag, and having *English* or *Scotts* aboard, at least such as spoke the *English* Language, the said Captain *Thomas Green* and his Crew, after some intercomuning with them, did without any lawful Warrant, or just Cause, attaque the said other Vessel or Ship, while expecting no such Treatment, and invading her first by their Sloup, which they had manned, and furnished with Gunns and other Arms for that purpose; They fell upon the said other Vessel in an hostile manner, by shooting of Gunns and otherways, and after some time spent in fighting against her by their Sloup, and partly by the approaching of the said *Thomas Greens* Ship the *Worcester*, they overcame, and boarded the said other Vessel, and having seized their Men, they killed them, and threw them over-board, and then carried, or caused carry away

way the Goods that were aboard of the said other Vessel to their said Ship the *Worcester*, and then disposed upon the said Ship, by selling her ashore on the said Coast. Which Crime being a wicked Piracy, committed by surprize, in parts so remote, and probably with all the Caution the Committers could use for concealing thereof, and for preventing Discoveries, comes now to be discovered in the several parts and Circumstances of the Action, and by such as were present thereat; Which being all conjoyned, does make up and infer the foresaid Crime objected, and are as follows, *viz.* That the foresaid Encounter and Fight betwixt Captain *Green* and his Crew and the said Vessel the *Worcester*, and the foresaid other Vessel taken by her, hapned on the said Coast as above: *Likeas*, at the same time, one or more of the said Ship the *Worcester* her Crew being on shore, and at some distance from the Sea, heard the said Shooting, which brought the saids persons to the shore, where they, at least the Chyrurgeon of the said Ship the *Worcester* one of them, saw her riding at a good distance from the shore upon her Birth (as they speak) and having the other Ship at her Stern, as it were tyed or towed to her, as being the Vessel they had mastered or overcome as said is. *Likeas*, the said Chyrurgeon did see the Boat belonging to the said Ship the *Worcester* coming ashore from her, and the Chyrurgeon demanding at such of the Crew as were in her, what had brought them ashore: They answered, that they had been *Busking* (a Sea-term used for fitting and trimming a Ship for fighting) and that they had Drunk, Spilt or Staved all their Water, and they were come for a new Supply; and when a little time thereafter the said Chyrurgeon went aboard the said Ship the *Worcester*, he perceived the Deck thereof Lumbered and covered, and in a confused manner, with Balls, Boxes and Goods; whereof when he asked the Reason, *John Madder* one of the Pannels, and a principal Actor in the Engagement, Answered, --- *Damn you, what have you to do to Inquire, meddle with your Plaister-Box.* And when the Chyrurgeon went down to his Station and Chest, he called for one of the Blacks *Antonio Ferdinando*, and one *Duncan McKay* now dead, and another, in order to dress them; but when he asked what way they came by their Wounds, they declined to answer; whereupon the Chyrurgeon refusing to dress them, if they would not tell him how they got their Wounds, the said *John Madder* came to the Chyrurgeon in a Passion, and asked what was his business to ask so many Questions, when he did see the Wounds so plain before him, calling him a Blockhead for not dressing them; and at length the Contest was so warm betwixt the said *Madder* and Chyrurgeon, that *Madder* charged him to ask no more Questions, and he charged the Men wounded, not to answer a word: And further, ordered him back to the Shore, which the Chyrurgeon was forced to comply with, where the Chyrurgeon meeting with *Francisco De-olivera* their Linguister, asked him whether he saw any of the *Worcesters* Men that had carried the foresaid Ship so taken into *Keilon* River, and the Linguister answered, that he had not, but that they were some of the *Worcesters* Company, who as soon as they had brought her in, and made her fast, took their Boat and went directly on Board: The Ship taken being carried into *Keilon* River as said is, where she was left with her Yards and Top-masts down, all unrigged, and the said Linguister told the Chyrurgeon further, that one *Coge Commodo* complained he had bought the said taken Ship too dear, whereby it appears that the said Ship taken by violence, was sold in manner foresaid. *Likeas*, for further evidence of the said Piracy, since the time that *John Reynolds* one of the Pannels was seized with the rest, for his accession thereto, there was found a Letter wrote to him by one *Sarah Newlands*, bearing Date the 6 *January*, wherein she tells him, that tho he had been basely wicked, yet she should be sorry to hear he were guilty of any thing that might bring him to the Gallows; and therefore

advises him to confess, adding, that in his own Letter which she had seen, he says, that some of their Men had basely confessed (which says she) imphs that they were guilty ; And when *Reynolds* was questioned upon his Letter, he acknowledged that he had wrote a Letter to his Wife the said *Sarahs* Sister, which had occasioned her writing the said Letter to him, and thereupon he produced the Copy of the said Letter to his Wife, which agrees with what *Sarah* says, as the said Copy and *Sarahs* Letter both put in the Clerk of the Admiralties Hands, to be seen by the Pannels, bear. And further, *George Haines* one of the Crew of the said *Worcester*, since his coming to *Scotland*, and when at *Bruntisland*, being asked by one *James Wilkie* Taylor Burgefs of *Edinburgh*, some day in *October* last, about his Brother *Andrew Wilkie*, who went Chyrurgeon in Captain *Drummonds* Ship, if ever the said *Haines* had seen the said *Andrew Wilkie* in his Voyage, he flew in a Passion, and said, *what Devil was his concern with Captain Drummond?* upon which, *James Wilkie* forbearing a little, till he should be calmer, asked the said *Haines* again, whether he had heard or seen any *Scots* Ships coming to or from the *East-Indies* during their Voyage? *Haines* answered, that when they were upon the coast of *Malabar*, a Dutch Ship informed them, that one Captain *Drummond*, commanding a *Scots* Ship, and having a Sloop in Company, was turned Pirat; upon which *Haines* said, they manned their Sloop to be in readiness, but saw him not, only a little thereafter, *Haines* added, that he had in his custody the time the said Ship the *Worcester* was seized, which he would not have fallen in the Seizers Hands for twice the value of the Ship, but that he had thrown it over-board : Adding further, that there was still in the Ship what would never be found by the Seizers, unless they pulled her Board from Board, tho he knew where the thing lay ; Likeas, when after the said *James Wilkies* departure, one *Anna Seaton* did, at his desire, further inquire at *Haines* about Captain *Drummonds* Ship, he answered, that they had a design to pump him, but that they should not be the wiser of him: At all which Passages *Kenneth Mackenzie* Indweller in *Cannongate* was a present Witness, and the said *Anna Seaton* did further tell the said *Kenneth Mackenzie*, That when she expostulat with *Haines* for his being in a Passion as said is, He answered, that he knew more of Captain *Drummond* than he would tell at that time, & that if the said *Andrew Wilkie* was with Captain *Drummond*, he would not be seen again. And further, the said *Anna Seaton* heard the said *Haines* owne and declare their said Wickedness, and she and *William Wood* one of the Gunners of Her Majesties Artillery, with one *John Henderson* Writer in *Edinb.* being in *September* last at *Anna Seaton's* Mothers House, after having drunk a Health or two, the said *Haines* who was there present, fell in a Melancholly Fit, and expressed himself; *That its a wonder that since we did not sink at Sea, God doth not make the Ground to swallow us up, for the Wickedness that has been committed during the last Voyage on board of that Old Bitch Befs*, pointing to Captain *Greens* Ship. And further, the said *Haines* said, that if what the said *John Madder* had done in the said Voyage were well known, he deserved as much as his Uncle *Madder* met with at *Amsterdam*, who was there burnt in Oyl, for attempting to burn their Ships; and when at another time, the said *Anna Seaton* told *Haines*, that she had an old Sweet-heart who went away with Captain *Drummond*, and would gladly hear some Tydings, whether he vvas Dead or Alive : The said *Haines* vwho vvas then a Suiter of *Anna Seaton's*, assured her, she vwould never see him again if he vvas in *Drummonds* Ship. And for a further Confirmation of the Truth of the said Piracy, vwhen a Committee of Council vvas sent to *Bruntisland*, to cause search and unload the said Vessel ; It vvas found by the Skippers and Seamen imployed, that the Goods aboard her vvere not storved as Merchant Goods used to be, but vvere found in the Hold

(9)

Hold in such confusion, as if taken by Piracy, and no otherways. *Likeas*, when the said Ship the *Worcester* was seized, the said *John Madder* being questioned about Captain *Drummonds* Ship, he took out of his Pocket, or at least shewed in his hand, the Seal of the *African Company*, which he could never have lawfully got. By all which, they being joyned and connected together (as a Discovery of such a Wickedness practised in such remote Parts, and so industriously and obstinately endeavoured to be concealed, deserves to be) the same, in all the Points and Circumstances thereof, at least such, and so many of them as are relevant, and are offered to be proven by a cumulative Probation, do plainly amount to such a plenary Evidence, as may fully convince all impartial Men, that the foresaid Captain *Green* and his said Crew, are all and each of them guilty, Art and Part of the foresaid Crimes of *Piracy*, *Rabberie* and *Murder*, or one or other of them above charged; which being found by a Verdict of an Assize before the Judge of the Admiralty, and the Lords Assessors appointed by the Lords of Privy Council, the forenamed persons, and each of them ought to be punished by Sentence of the said Court, with the pain of Death, and Confiscation of their Moveables, to the Example and Terror of others, to do or commit the like in time coming.

Additional Conclusion of the Indictment at the Instance of Mr. Alexander Higgins Procurator-fiscal to the Court of Admiralty, against Captain Tho. Green, &c.

viz. **T**HAT the Conclusion of the said Indictment given on *Saturday*, the seventeenth Instant, bearing the pain of Death and of Escheat and Confiscation of Moveables, should extend to the Escheat and Confiscation of the said Ship and Cargo, by reason of the foresaid Crime of *Piracy*; and that the said Captain *Thomas Green*, &c. should answer to the foresaid Conclusion, as thus explained, and extended to the Confiscation of the said Ship and Cargo, as in the case of *Piracy*, the foresaid 5 of *March*, which is the day of compearance assigned to the saids Pannels, or at least upon the 6, 7, 8, or 9 days of *March* thereafter, as the true Import, or at least a clear Consequent of the foresaid Crime and Indictment given thereupon; The List of Witnesses and Assizers remaining the same, as subjoyned to the foresaid principal Indictment, *Sic subscribitur* ALEXANDER HIGGINS.

PURSUERS.

Mr. *Alexander Higgins* Procurator-fiscal.
 Sir *James Stuart* Her Majesties Advocat.
 Sir *David Dalrymple*, and Mr. *William Carmichael* Her Majesties Solicitors.
 Sir *Patrick Home*.
 Mr. *Alexander Mackleod*.
 Mr. *Francis Grant*.
 Sir *Gilbert Eliot*.
 Advocats.

Procurators in DEFENCE.

Sir *David Cuninghame*.
 Sir *David Theirs*.
 Sir *Walter Pringle*.
 Mr. *David Forbes*.
 Mr. *George Alexander*.
 Mr. *John Spotswood*.
 Mr. *John Elphinston*.
 Advocats.

The Procurator-fiscal declared, he judicially passed from *Samuel Urlines* Carpenters-mate of the Ship the *Worcester*, *Henry Barns* Seaman, & *Daniel Stringman* Cook of the said Ship; vwhereupon they vvere dismissed from the Barr.

Alexander Higgins.
 Her

Her Majesties Advocat for the Pursuers craved, that the Dyet against Captain *Thomas Green* and others contained in that Indictment with him, might be continued.

It was objected by the Pannels Procurators, that the Dyet could not be continued against them, being contrair to the Act of Parliament for preventing *wrongous Imprisonment*, and contrair to an expresse Clause therein.

It was replied for the Pursuers, that the Act of Parliament is opposed, which only requires the Dyet of the Tryal to be fixed within sixty days after Intimation, vvhich vvas done, but then allowvs to the Pursuers to insist, and to the Judge to determine by a final Sentence vwithin 40 days, if before the Lords of Justiciary, and 30 days, if before any other Judge.

Which Objection, with the Answers and Replies made thereto, being considered by the Judge and Assessors, they repelled the Objection, and continued the Dyet against the said Captain Green and others contained in the Indictment against him, till Wednesday next at Nine of the Clock : And Ordained the Pannels to be carried back to Prison.

JAMES GRAHAME, I. P. A.

It vvas alledged by the Procurators for the Pannels, that the Crime libelled being alledged to be committed upon the Coast of *Malabar*, and by *English-men*, they ought to be remitted to be tryed in *England*, and cannot be judged by the Judge of the High Court of Admiralty and Assessors, vvho are not Judges competent.

The Procurator-fiscal and Pursuers Procurators answered, that they opposed the Act of Parliament 1681, which founds the Admirals Jurisdiction in the case libelled. Declaring expressly, *That the High Admiral hath the sole Priviledge and Jurisdiction in all Maritime and Sea-faring Causes, Forraign and Domestick, whether Civil or Criminal whatsoever, within this Realm, and over all persons as they are concerned in the same, and that he is His Majesties Lieutenant and Justice-General upon the Seas, &c.*

Which Alledgeance and Answer, with the other Replies and Duplies being considered by the Judge and Assessors ; They repelled the Alledgeance, in respect of the Answer, and found that the Judge Admiral and Assessors are competent and proper Judges, to cognosce and determine in the Case and Crimes libelled.

JAMES GRAHAME, I. P. A.

THE grounds of the Indictment at the Instance of the Procurator-fiscal against *Henry Keigle, George Haines, Samuel Wilcocks, George Glen, Alexander Taylor* and *John Bannantyne* here present, being fully debate *viva voce* ; The Judge of the High Court of Admiralty and Assessors continue the Dyet, at the said Mr. *Alexander Higgins's* instance, against the said *Henry Keigle* and other Pannels above-named, till *Tuesday* the 13 instant at nine a Clock in the Forenoon, and ordain both Parties to give in their Informations betwixt and that time, the Pursuer to give in his betwixt and *Thursday* next at twelve a Clock of the day, and the Pannels to give in theirs betwixt and *Saturdays* Afternoon thereafter, in order to be recorded in the Court-Books : And ordains the Affizers and Witnesses to attend then, and at the other Dyet upon *Wednesday* next against Captain *Green* and others, ilk Person under the pain of one hundred Marks, and the Pannels to be carried back to the respective Prisons.

JAMES GRAHAME, I. P. A.

Curia

CURIA JUSTICIARIA *Supreme Curia Admir-*

ralitatis tenta in Prætorio, vel nova Domo Sessionis burgi de Edinburgh, septimo die Mensis Martii 1705. per Judicem dictæ Curie, & per honoratissimos viros Joannem Comitem de Loudoun, Joannem Dominum de Beilhaven, Dominos Robertum Dundas de Arnestoun, Joannem Home de Blackadder, & Joannem Cockburn de Ormiston Assessores.

Curia Legitimè Affirmata.

Intran.

Captain *Thomas Green* Commander of the Ship called the *Worcester*, now in *Bruntisland* Harbour.

Captain *John Maddar* Chief-mate of the said Ship.

John Reynolds Second-mate of the said Ship.

Thomas Linsteed Assistant to the deceased *Supercargo* of the said Ship.

James Burn Boatswain of the said Ship.

James Simpson Gunner.

Andrew Robertson Gunners-mate.

John Bruckly Seaman.

George Kitchen Seaman.

All of them Indicted and accused at the Instance of Mr. *Alexander Higgins* Advocate, Procurator-fiscal to the High Court of Admiralty, for the Crimes of *Piracy, Robberie and Murder*, in manner mentioned in the Indictment raised against them thereanent, before insert in the Court holden the fifth of *March* instant.

PURSUERS:

Mr. *Alexander Higgins* Procurator-fiscal.

Sir *James Stuart* Her Majesties Advocate.

Sir *David Dalrymple* and Mr. *William*

Carmichael Her Majesties Solicitors.

Sir *Patrick Home*.

Sir *Gilbert Eliot*.

Mr. *Alexander Mackleod*:

Mr. *Francis Grant*.

Advocats:

Procurators in DEFENCE,

Sir *David Thoirs*.]

Sir *Walter Pringle*.

Mr. *David Forbes*.

Mr. *George Alexander*.

Mr. *John Elphinston*.

Mr. *John Spotswood*.

Advocats.

The grounds of the Indictment at the instance of the Procurator-fiscal, against Captain *Green* and other Pannels here present, and the Reasons why *John Reynolds* one of the Pannels, who is a Witnes cited in the Exculpation at the instance of the other Pannels, should be tryed first upon the Libel, to the effect, that if assoilzied, he may be adduced as a Witnes for the said other Pannels in the foresaid Exculpation, being debate *viva voce*. The Judge of the High Court of Admiralty and Assessors, continue the Dyet at the said Mr. *Alexander Higgins* Instance, against the saids haill Pannels, till *Tuesday* the thirteenth instant at nine a Clock in the Forenoon. And Ordains both Parties to give in their Informations betwixt and that time, the Pursuer to give in his betwixt and to morrow, and the Pannels to give in theirs betwixt and *Saturday* thereafter, in order to be recorded in the Court-Books: And Ordains the Assizers and Witneses to attend, ilk person under the pain of two hundred Merks, and the Pannels to be carried back to Prison. JA. GRAHAME, I.P.A.

INFORMATION

For Mr. *Alexander Higgins* Procurator-fiscal of the High Court of Admiralty.

Against

Captain *Thomas Green* Commander of the *Worcester* and his Crew and Complices.

THERE being two Libels raised before the high Court of Admiralty, and the Lords Assessors appointed by the Lords of Privy Council, both at the instance of the said Mr. *Alexander Higgins*; But the first against *Henry Keigle* Carpenter in the Ship, called the *Worcester*, now in *Bruntisland* Harbour, *Samuel Urlane* his Mate, *George Haines* Steward of the said Ship, *Daniel Stringman* Cook in the said Ship, *Samuel Wilcocks* Chyrurgeons-mate, *George Glen* Seaman there, *Henry Barns* Seaman there, *Alexander Taylor* Seaman there, and *John Ballantyne* Seaman there: And the second against the said Captain *Thomas Green* Commander of the said Ship the *Worcester*, Captain *John Madder* chief Mate of the said Ship, *John Reynolds* second Mate of the said Ship, *Thomas Linsted* Assistant to the decessat Supercargo of the said Ship, *James Burn* Boat-swain of the said Ship, *James Simpson* Gunner of the said Ship, *Andrew Robertson* Gunners-mate, *John Brucklie* Seaman there, and *George Kitchen* Seaman there, all Prisoners.

Both the Libels being the same, the Tenor thereof prefix to the Information is *verbatim* conform to the Indictments on the preceeding Pages, in the Court holden the 5 of *March* 1705, and whereto this refers.

When the haill forefaids Pannels were brought to the Bar, and the saids Lybels read against them, the Procurator-fiscal declared, That he insisted first upon the first Lybel, *viz.* against the saids *Henry Keigle* Carpenter, *Samuel Urlane*, *George Haines*, *Daniel Stringman*, *Samuel Wilcocks*, *George Glen*, *Henry Barns*, *Alexander Taylor*, and *John Ballantyne*; And after some debate moved by the Pannels Procurators, that the Pannels having used the Method prescribed by the Act of Parliament, to bring themselves to a Tryal within sixty days, they ought now all of them to be insisted against: And it being answered, That all that the Act of Parliament required was, that a day should be fixt for the Trial within sixty days after the Charge given for that effect, the same was done, and also the whole Pannels so far insisted against, that their Libels were read, which fully satisfies that part of the Act, and that as to further insisting, prosecuting and concluding, the Act of Parliament allowed 40 days further before the Commission of Justiciary, and 30 days before any other Inferior Judicature; So that the Procurator-fiscal might very well proceed against these contained in the first Libel this day, and continue these contained in the second Libel till the next Court-day: The Lord High Admiral repelled the forefaid Alledgeance made for all the Pannels, and allowed the Procurator-fiscal to insist against these in the first Libel the forefaid 5th *March*, and continued the Dyet against these in the second Libel till the 7th of the said Moneth.

It was then alledged for these in the first Libel, No Process, in regard the Crimes charged were lybelled to have been done in the *East-Indies* in *Mahabar*, far without the *Scottish-Seas*, nor was there any Accuser either of the Own-

ers of the Ship and Goods, or of the nearest of Kin of the Persons, alledged; Murdered : So that the Admiral was incompetent to this Tryal; For the *competentia fori*, in Criminals, being founded either in the *locus delicti*, or in the *locus domicilii*, of the Pannels, or in the *locus originis*, neither of these could be presumed upon in this case; The Pannels being *English-men* and Strangers, and the Crimes libelled to have been committed in the *East-Indies* as said is : And *esto* that the Crime of Piracy may be tryed any where, where the Pirats are found; yet that is only where the accused are notoriously such. And further, tho' the Pannels could be accused here in *Scotland*, yet they could be only accused before the Commission of Justiciary, and not before the High Admiral, whose Jurisdiction extends no further than the Seas within the compass of Her Majesties Sovereignty.

To all which it is answered by the Pursuer. 1. That tho' the competency of the Judge in Criminals be ordinarily said to be founded either *in loco delicti*, or *in loco domicilii* of the Delinquents, or *in loco originis*, yet there is a superior consideration; and that is the *locus deprehensionis*, where the Criminal is found and deprehended, which doth so over-rule in this matter, that neither the *locus domicilii*, nor the *locus originis* doth found the Judges Competency *nisi ibi reus deprehendatur* ; And so it is, that here the Pannels were and are deprehended, which happening in the case of Piracy, a Crime against the Law of Nations, and which all Mankind have an interest to pursue, wherever the Pirats can be found, the Procurator-fiscal's Interest to pursue is thereby manifest, and the Pannels being here deprehended, cannot decline the Admirals Jurisdiction as incompetent. 2. As to what is alledged, that the Pannels are not libelled to be Habitual and Notorious Pirats, but on the contrary, had and do produce a Commission, which frees them of that Suspicion: It's answered, That Piracy being libelled, as to the particular charged, even habitual Piracy is thence presumed, but an single Act of Piracy libelled, doth both give the Pursuer a sufficient Title and Interest, and likewise founds the Admirals Jurisdiction, in respect the Pannels charged for Piracy, are here found. And 3. The Lord High Admiral is most proper for this Cognition and Trial, because by the Act of Parliament 1681, he is declared to be Justice-general upon the Seas, which albeit it be limited inwardly towards the Land, yet outwardly is not limited ; So that the Lord High Admiral is there declared to have the sole Jurisdiction in all Maritime and Sea-faring Causes Forraign and Domestick, whether Civil or Criminal within this Realm, and over all persons as they are concerned in the same, which as to the Seas and all Maritime Crimes whatsoever, makes the High Admiral Justice-general as said is, without Limitation ; And therefore it is in vain for the Pannels to pretend, that if their Cause be cognoscible here, it must at least be tryed before the Commission of Justiciary, since the Lord High Admiral is in this case fully vested with the Justice-generals Power, and as for what may be the custom of *England*, it doth not concern, nor can be any Rule for us.

And the Lord High Admiral and Assessors having advised the Debate, they repelled the Declinator, and found the Court competent.

Thereafter it was alledged for these in the first Libel, That they were convened as having been of Captain *Green's* Crew, and his Complices in the Crimes libelled, so that he being their Commander and Captain, they could not be put to answer, unless the Captain himself were first insisted against; Seing first, it was obvious, that he being their Commander and Captain, ought first to be answerable. And 2. That they being under his command, could not be charged for any thing alledged done by them as his Crew, unless he were first tryed, seing that he might have Defences both for himself and them, which probably they could not make for themselves.

To which it was answered by the Pursuer, That the Captain and his Crew

were not conveyed for any thing alledged acted by him as their Captain, and by them as his Crew, but were all conveyed as Complices and *socii*, and partakers of the foresaid wicked Crimes of Piracy, Robbery and Murder, which Crimes as they could be warranted by no Commission or Character, the Captain did or could pretend, so could they be as little warranted by their condition of being subject to him as his Crew; For here the Saying holds, that they were all *hic socii & facinus quos inquinat aequat*. As also the other Maxime, That Wrong has no warrant; and therefore, seeing that neither the Captain's Character, nor their condition as his Crew, could be pretended as a defence either to him or them, and that the Libel of the foresaid Crimes did charge them all, as being *Socii*, and together involved therein; And that without question in the case of such an Accusation for such horrid Crimes, every one must answer for himself, the Alledgeance could not be respected, besides that it was evident, that if Captain *Green* and these in the 2^d Libel, were all confessing and pardoned, yet the first Libel against these of his Crew therein contained, would still lawfully proceed, and Captain *Green* himself, and those joyned with him in his Libel, might be made use of as Witnesses against these contained in the first Libel; By all which it was evident, that the Tryal ought to proceed against these in the first Libel, without respect to the foresaid dilatory Defence: This being the dilatory Defence objected against the first Libel, and answered above, and the peremptory Defences against both Libels being common and co-incident, for the more clear Method, the dilatory Defence proponed also for these contained in the second Libel, with the Answers thereto, are hereto subjoyned.

The dilatory Defence then proposd for Captain *Green* and others in the second Libel, was, the foresaid *John Reynolds* was conveyed and impannelled with him; whereas it was acknowledged by the Pursuer, that *Reynolds* was ashore the time of the Piracy, and other Crimes libelled to have been committed by Captain *Green* and the rest of his Complices, whereby *Reynolds* appeared even by the Pursuer's Acknowledgement to be innocent. *Likens*, Captain *Green* and the other Pannels had raised an Exculpation, and therein had cited *Reynolds* for a Witness, so that according to the Method practised in Criminals, Captain *Green* and the other Pannels had good ground to demand, that *Reynolds* might be first tryed, and so purged from being *socius criminis*, and put in case to be a Witness for the Captain and the other Pannels, to prove their grounds of Exculpation, for there could be nothing more reasonable as it was also ordinary, than that when a Pursuer did raise a Libel against several persons, whereof some were innocent, and might be Witnesses for the other Criminals and Pannels, these other Pannels might justly crave that such as they alledged to be innocent might be first tryed and purged, and so made capable to be Witnesses, since otherways any malicious Pursuer might include both the Defenders and all their Witnesses in one Libel; and thus by making the Witnesses *socii criminis* in the Libel, prejudice the Defenders of all their Evidences and Defences.

To which it was answered for the Pursuer, that he acknowledged, that when such a Course was taken to include both Actors and witnesses in one Libel, with a design to make the Witnesses, which the Actors were to use *socii criminis*, and so to deprive the Actors of their Defence, and the Probation thereof, these Actors might and were allowed to condescend upon those whom they intended to use as Witnesses, and at the same time to propose a ground of Exculpation for them, and so crave that they might be first tryed upon the foresaid ground, to the effect, that if thereupon acquit, they might be in case to be Witnesses; But this could never be pretended to by any of the Pannels, for an antecedent Tryal of such of their *Socii* as they alledged were innocent, and to be their Witnesses, unless at the same time the Pannels did condescend upon the

the ground of their Innocence, or upon the ground of their Exculpation, whereupon they desired them to be first tryed, for otherways there could be nothing more groundless, and in effect, manifestly tending to elude all criminal proceeding against Complices of the same Crime, than to allow any of them at *random* to crave others to be first tryed; And so the Tryal to proceed of one single person after another, until all should be assolized; Whereas the true and plain Method was, and is, That the Pursuer insists against such as he pleases, either singly or joyntly, and unless some Speciality be alledged, why the Tryal of one should proceed before the Tryal of another, it never was nor could be left to the Arbitriment of the Pannels; and thus it was practised in all the instances alledged by the Pannels of trying such as were impannelled for *socii criminis*, to be first purged in order to be Witnesses, *viz.* That the same was never allowed, unless some ground of Exculpation was positively alledged for clearing of their Innocence: And therefore, unless Captain Green and the other Pannels, will positively offer to prove, that *Reynolds* whom they would have first tryed was *alibi*, and not present in the Action, their Arbitrary Demand of having him tryed in the first place, without any Reason assigned, cannot be regarded.

Which Debate being heard, the Lord High Admiral and Assessors superceeded to give answer until the Defendants should give in their other Defences, and all should be informed upon together.

These being the preliminary Defences, separatly proponed by the persons convened in the first and second Libels, the following Defences were proponed in common by the Defendants in both Libels.

And 1. That the Libel was informal and insufficient, as being too general and indefinit. And 2. That it did not condescend upon Day and Place. And 3. That the Qualifications whereupon the Relevancy appeared to be founded, were wholly irrelevant. And 4. That the additional Conclusion was groundless and unwarrantable.

And as to the first of these Defences, It was alledged, that the Libel was informal and insufficient, as being too general and indefinit, not condescending upon the Name and Designation of the Ship wrongously attacked, nor upon the Persons & Designations of these alledged to be murdered, nor upon the Quantity & Quality of the Goods alledged to be robbed & spoiled; All which ought to be done, seeing that Criminal Libels ought to be certain, and not general and indefinit, whereby also the Defendants might be prejudged of Defences that might arise to them upon a particular Condescendance; As for example, if the Name and Designation of the Ship were condescended on, they might prove the same Ship to be yet existing, and so of the persons alledged Murdered, they might prove them to be yet alive: As also, that the Goods alledged Robb'd, were yet extant, and lawfully disposed on by their Owners.

To which it was answered by the Pursuer, that he opposed his Libel, which was libelled as definitely and closely as the thing would allow; for it being lybelled, that the Pannels did without any lawful Cause or Warrant attacque a Ship sailed by her own Crew, and having her own Cargo aboard, and that they over-mastered the said Ship in hostile manner, and Murdered the Men, and Robb'd their Goods; These were certainly Crimes manifest in themselves, and if the Pannels had acted them in such manner as to destroy the Ship and the Men, and embazled the Cargo, so as no further Knowledge could be had thereof, it was only an Aggravation of their Villany and Wickedness, but could never hinder the Accusation to proceed, seeing that whatever the Ship or Men or Goods were, it was certainly Piracy, Robbery and Murder, to attacque a Ship hostilely, and to destroy the Men, and rob the Goods: And further, a Condescendance was not at all in this case necessary, seeing that any such Con-

descendance could be no ground of Exculpation, for whether the Ship was of such a Name and Designation, or of another, or whatever the Men and the Goods were, yet the Crime was still the same, *viz.* To attack and invade a free Ship without any Cause or Warrant, and to kill her Men and rob her Goods; And further, its very well known in our Criminal Practice, that Robberies and Depredations are sustained, albeit neither the Quality of the Goods nor their Owners be condescended on; And in effect, the Pannels their Defence of indefiniteness upon the ground foresaid is such, that if even in the Road of *Leith* before hundreds of Spectators from both Coasts, one Ship should attack another, and hostilely invading her, should destroy her Men, seize her Goods, and sink the Vessel, without suffering either Vessel, Men or Goods to be known, there could be no criminal Libel upon it, because forsooth, tho hundreds see the whole Action, yet it could not be more definitely Lybelled, save that the Commander and Crew of the one Ship attack'd the other hostilely, and destroyed her Men, and seized her Goods, and sunk her without further Condescendance, which were most absurd; And therefore, the Lybel as it's lybelled, both as to Ship, Men and Goods attacked, Murdered and Robb'd, without any just Cause or Provocation, is both sufficiently definit and most relevant.

And whereas the Defenders alledged, this *Indefinit* Lybelled should the rather be rejected, because that the Pannels were cloathed with a Commission, which tho they did not plead to exculpat the particular Charge brought against them, yet was always a ground of presumption that they acted lawfully, unless the contrair were made appear by a particular Condescendance.

It was answered, That nothing did charge the Pannels more home than the pleading of this Commission; In so far as 1. They neither could nor durst plead it to exculpat the Piracy, Murder and Robbery charged. 2. It did not so much as make any Presumption for the Pannels, because the very Tenor of the Commission obliged them to keep a particular Journal of whatsoever Vessel they should attack hostilely, and their Journals were produced by themselves, and no such thing appeared in their Journals; And therefore it was manifest, that their pretence of a Commission, is only the more wickedly to cover their Villany, since they can alledge nothing acted suitably to their Commission, but that their own Journals redargues them.

The second Defence alledged by the Pannels in both Lybels was, that the Lybel was still defective and imperfect, wanting Day and Place; in so far as the Place was generally designed the Coast of *Malabar*, which is of a long and vast Tract, and the day was one or other of the days of *February, March, April, May*, which is indefinit, and as good as no day, and Day and Place were not only required to be condescended on, by our old Law *Quon. Attach*; But the Condescendance is also necessary for the Defenders Exculpation, seing that if Day and Place were condescended on, he might then prove himself *alibi*, and so elude the Lybel, which now he cannot do.

To which it was answered, that the Condescendance in the Lybel as to Day and Place is sufficient, because the Facts objected are thereby plainly declared. 2. Day and Place are never essential to a Lybel, except where either the Nature of the Crime, or its particular Specification requires it, for then indeed it must be distinctly and positively lybelled, as if a Man either charge another, or aggravat his Crime, by its being a breach of the *LORDS Day*, then the *LORDS Day* must be condescended on, or if a Man lybel another for bearing or drawing his Sword within the Kings Palace, where the Place is also essential, but as to other Crimes, which of their own Nature are Crimes at all times, and in every Place, Day and Place are not essential; nor is the Mention thereof necessary, for what can the Mention of Day or Place signifie
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in such Crimes, as at all times and in every place, are Crimes without Exception, and such are the Crimes lybelled. But 3. If it be said that the condescending on Day and Place is necessary to afford the Defender his just Exculpation of *alibi*. Its answered, That in that case, the Defender may put the Pursuer to condescend on Day and Place for proving his Exception of *alibi* as said is; But then in common Sense and Law, it must be upon this condition, that the Defender acknowledge the Crime charged to have been committed, and only endeavours to exculpat himself by offering to prove *alibi*, and that more pregnantly, than the Pursuer offers to prove his Indictment; for what Sense or Reason is there, that the Pursuer should be put to condescend positively on Day and Place in Crimes, that are Crimes at all times, and every where, unless it be for this very Reason, that the Defender acknowledging the Crime, offers to purge himself by the Exception of *alibi*; And therefore since Day and Place are lybelled in such a just Latitude, as may declare the Facts and Crimes charged, and that the Defender on the other hand doth not acknowledge the Facts and Crimes themselves, and offer to clear themselves by the Exception of *alibi*, there needs no further Condescendance, and this is the constant Opinion of Lawyers, and the perpetual Custom of our Practique.

The 3^d Defence proponed for the Pannels was as to the Qualifications of the Libel, That they were no ways relevant, nor could be regarded to infer the Conclusion of the Lybel, in as much as, 1. There was here no *corpus delicti* offered to be proven, which is always necessary, and principally where the Crime is offered to be proven *per presumptiones & indicia*. For there *cum constet de corpore delicti*, this sustains the Presumptions, and gives the *indicia* their just weight.

To which it was answered, That the Pannels Procurators appear to be in a Mistake, either as to what is the *corpus delicti*, or as to what is meant by it; And for clearing of this Point, it is to be considered, That Crimes are of two Natures, some *cum effectu permanente*, as the killing of a Man, or the burning of a House; in which cases, the dead Body and the Rubbish are permanent Effects: But other Crimes have no such permanent Effects, as treasonable Plotings, Fallhoods, Blasphemies and the like, where indeed there is no such *corpus delicti*, as in the former Crimes, but here all the Crime consists *in facto & animo*, and the Fact tho transient, yet if *dolose* done, makes the Crime: and therefore, according to this Distinction, the *corpus delicti* is never requisite to be proven, but in the foresaid Crimes that leave permanent Effects, and neither then also, unless the Crimes be lybelled with these Effects; For if it should be lybelled for Example, that a Murderer not only killed, but burned the Body to Ashes, or drowned it in the Sea; there would be no further need to prove this *corpus delicti*, but only to prove the Fact of Killing, and Killing *dolose*, in which indeed the Essence of the Crime consists; And thus in Confessions as well as in Libels, if a Man confesses a Murder, and yet the Body murdered no where appears, then the Confession is not rashly to be laid hold upon, because it may proceed from Design or Melancholy: But yet even in this case, that the Confession should bear not only the Murder, but the destroying of the Body murdered, by Fire or Water, as said is, then all the Inquiry would be, whether the Fact or Murder be proven or not? Which things if applyed to our present case, where it is expressly lybelled, not only that the Pannels invaded the Ship by Piracy, but that they threw the Men murdered over-board into the Sea, and also sold the Ship, all the Inquiry, which remains, is, whether this Fact was so done or not? And the Libel is most relevant, tho neither Ship nor Men appear: And yet further, if the Pannels Procurators will still be so grossier as to require a *corpus delicti*, when it's expressly lybelled, that the Effect of the Delict was destroyed, and put out of the vway, they may satisfy themselves that

Goods robbed are still extant, and were found aboard of Captain *Greens* Ship; And therefore it's plain, that in this case, and to sustain the *Indicia* and Qualifications lybelled on, there needs no further either Condescendance or proof of the *corpus delicti*, which was industriously destroyed.

But 2. It was objected, that all the Qualifications are insufficient and remote, and at best but probable; Whereas the known Rule is, that Crimes must be proven either *per Testes* above Exception, or *per documenta clarissima*, or *per indicia indubitata*; None of which hold in this case: For as for the *Indicia*, there is not one of them, but take the same singly, as the hearing of shooting on the Shore, the seing the Ship the *Worcester* having another lying at her Stern, the Boats coming a shore for Water, and the Crew saying *they had been a Busking, & sic de ceteris*; but take them singly, and they may all have a good and innocent Construction; Nor can it be said that joyntly they become stronger, and fortify one another, as single Arrows easily broken a part, yet cannot be broken in a Sheaf; because that since all the Qualifications and *Indicia* in the Libel, may admit the foresaid Constructions to be put upon them, the Constructions will still take off the Face; besides that its well known that there are some *Indicia* only *probabilia*, and that the Law requires *Indicia indubitata*, it being still the safer side to spare doubtful Innocents, than to condemn only presumed and probable Guilt. To all which it is to be added, that its the common Opinion of Doctors, that Presumptions can scarce ever conclude *ad penam ordinariam*, but at the most only *ad penam arbitriam*, and *Mackenzie* in his *Criminals* says, *Presumptions are only founded on May-beis, which may not be, and to allow Crimes to be proven by Presumptions, would leave Judges to be Arbitrary*; So that the common Opinion runs against Presumptions, But

To all this it is answered, That tho' it is clear Law, that Crimes may be proven *per indicia indubitata*, which in Law are no more than violent Presumptions, *que fidem extorquent*; yet the truth is, that in this case the Pursuer hath not only *indicia indubitata*, but likeways positive Witnesses, and also Documents in Writing; which all being conjoyned do make a satisfying Evidence; and fix a clear Conviction, which is the utmost design of Probation. But 2. Its most certain both in Law and Practique, that many Crimes are only discovered and proven *per presumptiones & indicia*, and that the Doctors in several Crimes, especially these more atrocious, as Treason, Piracy, Forgery and the like, where wickedness endeavours most industriously to hide it self, do allow and approve Probation *per indicia*, as most necessary for the punishing of these Crimes. It were needless to multiply the Citations both from the Law and Doctors, that might be adduced in this case, As *L. 3. §. 2. D. de Testib.* where the Rescript bears, *Que argumenta ad quem modum probande, cuique rei sufficient nullo certo modo satis definiri potest*, and so furth: and so concludes *non utiq; ad unam probationis speciem cognitionem statim alligari debere, sed ex sententia animi tui, te estimare oportere, quid aut credas aut parum probatum tibi opinaris.* Item *l. 22. Cod. ad legem Corneliam de falsis; ubi falsi examen inciderit, tunc acerrima fiat indago argumentis, testibus, scripturarum collatione, aliisq; vestigiis veritatis, &c.* By which Law its plain, that *Indicia & presumptiones* have place, and may make full faith; and how can it be otherways, since first, it is certainly the interest of Mankind that Crimes be punished. 2. Its no less certain that Crimes endeavour to cover themselves. 3. That Proof or Probation is only to make an evidence for discovery. 4. That the End and Standard of this Discovery and of all Probation, is the satisfying Conviction of the Judge that has power to punish: Now if most Crimes be committed without Witnesses, and yet do otherways appear certainly to be committed, and if this Certainty arise from Presumptions, and be withal satisfying; it is just the same, as if the Crimes were proven by many Witnesses; And thus *Mathews de Criminibus. Tit. de pro-*

probationib. Cap. 6. per totum. and Gail. lib. 2. Obs. 149. Numb. 9. Where he reasons most justly upon Probation by Presumptions, where there is a difficulty by reason of the want of Witnesses, and still brings the Matter to this true Period, that whatever way Faith be fully made to the Judge, either *per testes*, or *per indicia*, or *per presumptiones*, the end of Probation is attained, and so the evidence sufficient.

The Procurators for the Pannels alledged, that this were to make Judges too arbitrary, but tho it hath indeed been the case of all Lawyers to prevent Arbitrariness, yet it's most certain, that where evidence doth only rise as Providence offers, and Circumstances concur, the Arbitriment of the Judge must take place, and the safety of Mankind doth precisely ly here, in the Integrity and Discretion of the Judge, helped indeed by some Rules of Law, but no ways bounded or fixt to precise Rules, which the matter will not bear. And therefore we see, that even in the most certain manner of Probation, *viz.* By Witnesses, and the highest Law of it, that in the mouth of 2 or 3 Witnesses shall every thing be established, there is still an Arbitriment insinuat, as to the discretion of the Judge, or otherways the Law would not have said Two or Three, but would have fixed the Number precisely; whence it is most certain, that in all Probation there is an Arbitriment of Discretion, and that tho' this Arbitriment may be bounded by some Rules, yet the ultimat and true standard of all Probation, is the satisfying Conviction of the Judge, according to his best deserving.

These things then premised. *viz.* That a Proof may be sufficient *per indicia & presumptiones*, the Application to the present case is plain; for where the Procurators for the Pannels would take off the Qualifications as separatly inconcludent, and at best probable, it is clearly captious, it being certain that many *indicia* conjoyned and connected as in this case, may make a sufficient evidence, and that here *que non prosunt singula, multa juvant*; And thus if first, the Probation offered of the hostile invading the other Ship by the Pannels should be laid down, & thereto added the Chyrurgeons Declaration of other Circumstances, with all the other Qualifications in the Libel, they will certainly force a Faith and full perswasion upon all rational Men, tho separatly they cannot have that weight; one Witness proves not, yet two prove, and in some cases two are scarce sufficient, but three are beyond Exception; If then even in Witnesses, there be a mutual and fortifying Concurrence, the same must also be admitted in Presumptions & *indicia*; So that upon the whole, the Pursuer craves no more, than that every Man that hears this Libel, and shall hear its proof, lay himself fairly open without any prejudice to the light arising naturally from the Matter it self and its Circumstances, and the Proofs and Confirmations thereof, as they are set down in the Libel, and if he do not willingly resist, he will certainly be satisfied to a full Conviction: There are indeed hidden Crimes, and such as are said to be of difficil Probation; and the most atrocious (as Treason, Assassinations, Piracy, Forgery) are ordinarily most hid; And Doctors say with reason, that there Presumptions ought to be examined *acerrima indagine*, but all this should be far from impressing any with the prejudice, as if a satisfying Evidence may not be found in these cases; And therefore since all pleaded by the Pursuer, is, that first his complex Probation *per testes & indicia* may be fairly received. 2. That concurring and coming together they may be allowed their just Weight. And 3. That if that just Weight, and the Evidence that attends it be satisfying, it may be held as concludent; Its clear as the Sun Light, that no Streatch is intended, but Justice fairly prosecute; and tho in this case of such an extraordinary Crime, and where so much evidence appears, the Pursuer might even according to the *Claim of Right*, press the Supplement of Torture, yet he contents himself to insinuat,

that tho this may be both just and necessary, yet he is hopeful the force of his Evidence may otherways prevail.

The fourth Particular is the additional Conclusion, but as to that Conclusion, it is so natural in it self, and so well fortified by the Authority of Doctors, and so certain, not only in the case of Counterband, but even of other forbidden Goods, that nothing needs be added: For since every Pirat is presumed to have the Ship and all in it at his Command as his own, and since the Ship is certainly the instrument, as well as the Goods are presumed to be the effect of his Piracy, it follows naturally that the Confiscation of both Ship and Goods should be a part of the pains concluded.

In respect whereof, &c.

Follows the Laws and some other Quotations used in the Debate.

L. 2. §. 2. Ejusdem quoq; Principis extat rescriptum ad Valerium verum de excutienda fide testium, in hæc verba: *Quæ argumenta ad quem modum probanda cujque rei sufficient, nullo certo modo satis definiri potest, sicut non semper, ita sæpe sine publicis monumentis cujusque rei veritas deprehenditur, alias numerus testium alias dignitas & auctoritas, alias veluti consentiens fama confirmat rei de qua queritur fidem, hoc ergo solum tibi rescribere possum summatim, non utique ad unam probationis speciem cognitionem statim alligari debere, sed ex sententia animi tui, te æstimare oportere, quid aut credas haud parum probatum tibi opinaris.*

L. 22d. C. ad Legem Corneliam de falsis, ubi falsi examen inciderit, tunc acerrima fiat indago argumentis, testibus, scripturarum collatione, aliisq; vestigiis veritatis: Nec accusatori tantum quæstio incumbat, nec probationis ei tota necessitas indicatur: Sed inter utramq; personam sit Judex medius: nec ulla interlocutione divulget quæ sentiat: sed tanquam ad imitationem relationis, quæ solum *audiendi* mandat officium, præbeat notionem: postrema sententia, quid sibi liqueat, proditurus.

Mathæus de Criminibus lib. 48. dig. tit. 15. de probationibus pag. 675. Itaque si cum uno illo teste nulla concurrant argumenta, nequaquam audiendus erit, sed cum *Paulo* dicendum in lege *duo 30 d.* de testam. tut. non jus deficit sed probatio. At si argumenta alia concurrant, audiendus: non enim necesse est unum crimen, uno & eo probationis genere ostendi, veluti testibus tantum vel tabulis, vel argumentis: possunt & diversa genera ita conjungi, ut quæ singula non nocerent, ea universa tanquam grando reum opprimant *l. 3d. §. 3d* ejusdem d. de testib. hoc est quod aliis verbis dicitur plures probationes imperfectas posse conjungi.

Gail. Obs. 66. Num. 12. pag. 416. & regulariter Testes singulares plenam fidem faciunt, quando aliquid in genere probandum est, puta *Titium* esse infamem aut furiosum quo licet singulares sint respectu actuum, tamen si ratione finis conveniant integre probant.

It may be easily granted, that *regulariter indicia debent esse indubitata ad condemnandum reum*, but at that same time, it must likewise be owned, that there are Crimes excepted from the Rule, by the general Opinion of the Doctors, such as *crimen læsæ majestatis* & *crimen assassinii*, of which last sort the Crime of Piracy is the most atrocious: And therefore *Giurba in Consil. 22. Num. 15.* saith, *sed assassinii qualitas homicidio adjuncta novam constituit delicti speciem*, and

Num.

Num. 17. *in assassinio omnia procedant quæ in criminibus exceptis*, and Num. 18. *Assassinii crimen ob illius atrocitatem & enormitatem equiparatur crimini læsæ majestatis*, and then Num. 22. he concludes, that *in probatione assassinii probabilia sufficiunt argumenta*, and Mascard *de probationibus. conclus. 1228*. Num. 77. *in crimine assassinii probabilibus argumentis probari potest*. and Num. 78, 79, 80, and 83. he names the other atrocious Crimes, where the like Probation is sufficient, and in that same Conclusion, Num. 51. *Quod ex multis indiciis simul junctis resultat plena probatio etiam ad quem criminaliter condemnandum*. And Quæst. 8. Num. 8. *Probatio per evidentiam omnibus est potentior, & inter omnes ejus generis major est illa, quæ fit per testes de visu*. And Conclus. 831. Num. 4. *Probatio conjecturas & indicia in his quæ difficilia sunt probatu, & clandestine committuntur, habentur pro evidenti, & clara probatione*.

Carpzovius Quæst. 123. Num. 57. *Secus tamen res se habet si plura indicia concurrant & conjunctim reum aggravent, quorum unumquodq; per testem singularem probetur, nam una presumptio aliam juvat, plurimaq; indicia conjuncta fidem faciunt*.

And in the Tryal of John Swintoun for murdering of his Wife, there was no direct Proof by Witnesses, but the Libel being qualified, the proof was by a young Girl of 14 or 15 years, who left John Swintoun & his Wife alone in the House, & went to the Smiths Shop to enquire for Letters, but returning found the Door shut, and therefore went away for a little space, and then coming back and knocking, her Master opened, and she perceived some red, like Blood upon his Shoes; and when she came in, she found her Mistress dead in the Spence, which was all she could say; and then another Man declared, that he saw John Swintoun go from his House to a Stank, and there wash his Shoes; which *Indicia* being joyned with the proofs of their ill agreement, and frequent quarrellings of before, did determine the Assize; and tho it was stiffly objected, that in the mouth of 2 or 3 Witnesses, every thing should be established, and that in the foresaid case, there was no direct Witnes at all, far less two or three; And that even the foresaid Circumstances were only proven by single Witnesses, yet the Assize found that Evidence in the Presumptions and *Indicia* laid together, that they brought in their Verdict proven, and John Swintoun thereafter confessed, and was executed.

And in effect, unless that *Indicia* and Presumptions be sustained, and even single Witnesses for proving these several Presumptions and *Indicia*, which is called a cumulative Probation, when all the Witnesses and Testimonies concur *in idem crimen & ad eundem finem*, Crimes, and these the most atrocious would escape unpunished.

And therefore upon the whole, it is most certain, when Presumptions, Qualifications and *Indicia* concur and make a full perswasive Evidence, the Probation should be held for as fully sufficient, as the most direct Witnesses, since all that the Witnesses can do, is only to make full Faith in the matter, which may be otherwise supplied as said is.

As to the Additional Conclusion, it may be noticed, that Molloy *de jure Maritimo lib. 1. Cap. 4. §. 19. pag. 60.* saith, That when a Merchant procures Letters of Marque or Repryze, and then delivers the Commission to persons to endeavour a satisfaction, if such persons commit Piracy, the Vessel is forfeited without Controversy.

INFORMATION

For Captain *Thomas Green* Commander of the *Worcester*, Captain *John Madder* his chief Mate, and others.

Against

Mr. *Alexander Higgins* Advocat, Procurator-fiscal of the High Court of Admiralty.

THE saids Captain *Thomas Green*, Captain *John Madder*, and others belonging to the Ship called the *Worcester*, being pursued at the instance of the said Mr. *Higgins* Procurator-fiscal before the High Court of Admiralty, and the Lords Assessors appointed by the Privy Council, for the Crimes of *Piracy*, *Robberie* and *Murder*, conform to two criminal Indictments, raised at the instance of the said Fiscal: The case being fully plead before the Honourable Judges of Admiralty, and the Lords Assessors, both the Accuser and Accused were ordained, severally to inform, as use is in such cases.

The Criminal Indictments being holden as repeated, which coincide both as to the Conclusions and *media concludendi*, and denyed, it is needles to repeat some preliminary Defences that were proponed, seing it seemed just to the Honourable Court to repel the same, and therefore the Pannels proceed to their Defences, whereupon they were ordained to inform. These are of two sorts, 1. *Dilator*, and 2. *Peremptor*.

And 1. It was proponed for *Henry Keigle* Carpenter, and others of the Pannels in the same Indictment with him, That they could not be put to answer, unless the Captain himself were first insisted against, because they being his Crew, and under his Command, they could not be charged with any thing done by them unless he were first tryed.

It was answered for the Pursuer, That the Crew were not conveyened for any thing alledged acted by their Captain, and by them as his Crew; But that they were conveyened as *Socii*, and Partakers of the Crimes lybelled, which could be warranted by no Commission or Character the Captain did or could pretend to, and that they were all charged as being *Socii*, and involved together in one Crime, and so every one must answer for himself.

It was replied for the said *Henry Keigle*, and the other Pannels with him, that the Pannels are lybelled against as the Crew of the *Worcester*, under the Command of Cap. *Tho. Green*, & that under his Command, they did attack a Ship, &c. so that they are here lybelled only as Complices and Accessories to the Crime alledged; And therefore according to the Principles of Law, the principal Delinquent ought to be first Tried, especially where the Captain was in Custody, and might be brought to his Tryal, and that by the Commission produced under the Great-Seal of England, superscribed by King *William*; The said Captain *Thomas Green* was cleathed with a Power, authorizing him to attack and suppress Pirats, which is a Military Power, and consequently implyes an Authority and Command over the Crew of the Ship, to give ready Obedience in all these Matters, so that the poor Pannels who are of the Crew, have all reason in the world to contend, that the Captain, whose Actings in these Matters they could hardly well debate, should first pass the Tryal upon the Crimes al-

alleged, who might by vertue of his Commission, and otherways exculpate and defend himself against the Crimes libelled, and consequently all the Crew that were in Subjection under him. This Defence the Pannels might perhaps plead to a further Extent to absolve them intirely ; but at present they conceive it can hardly be denied, the Captain should first undergo the Tryal : And there is a great difference betwixt *Socii criminis*, which are either independent upon one another ; Or if associat under one Head, as *Banditi*, and Pirats usually are, which is an illegal and unwarrantable Authority taken up, and persons accused as *socii criminis*, who by legal Authority are subjected to the Command of others ; In which case, if the person trusted with the Authority has transgressed or abused it ; if it does not plead an absolute Exemption from the punishment of the Transgression, at least it should have this Effect, that the Head and Chistain should be obliged first to his Defence, which it is hoped the honourable Judges will find just and reasonable.

The other dilator Defence proposed for the Captain, and others in the second Lybel, was ; That whereas *John Reynolds* second Mate, was conveyened and pannelled with him ; As also some others as *socii criminis*, whom the Captain and other Pannels had cited as Witnesses in their Exculpation, it was both ordinary, and absolutely necessary, that these persons so cited for Exculpation, should be first tryed, to the end, that being purged of the Imputation of any Crimes they might be capable to be Witnesses, for proving the Defences of Exculpation that the Captain and the other Pannels did propose, and insist upon, for the Vindication of their Innocency.

It was answered for the Fiscal, That he owned, when both Actors and Witnesses were included in one Lybel, of design to deprive the Actors of their Defences, the Actors might, and were allowed to condescend upon those whom they intended to use as Witnesses ; But then at the same time, they were obliged to propose a ground of Exculpation for them, and so crave, that they might be first tryed upon the foresaid Ground, otherways they could not without such a special Condescendance intervert the Form of Tryal, and there could be nothing more groundless, tending to elide all Criminal Proceedings against Complices of the same Crimes, than to allow any of them at *random* to crave others to be first tryed, and so the Tryal to proceed of one single Person after another : Whereas the true and plain Method were, that the Pursuer insist against such as he pleases, either single or joynly. And unless some Speciality be alleged, why the Tryal of one should proceed before the Tryal of another, it never was nor could be left to the Arbitriment of the Pannels ; and therefore unless the Captain will offer to prove, that *Reynolds* and others whom they would have first tryed, were *alibi*, their arbitrary Demand of having them tryed in the first place, without any Reason, cannot be regarded.

It was answered for the Captain and the other Pannels, that their Demand upon this Point, was most consonant to Reason, Law and Form in Criminal Procedures ; that Exculpation, which tends to the proof of Innocence and freedom from Guilt, was most favourable ; because it is still presumed till the Crime be proved : And therefore it is, that Witnesses who are not regularly admitted for proving of a Crime, because of some Exception, will be allowed to prove the Defenders Innocence. And upon this account it is, that several things in Form are omitted in Exculpation, and there is nothing more material for defence of persons accused, against the Prosecutor, who ordinarily is prejudged and prepossessed, to guard them against all the indirect Methods that may be taken by the Pursuer, to preclude the Accused from the usual Means of proving of their Defences, than what is now demanded. And since none can be more proper Witnesses for proving a Pannels Defence, as for Instance, *Modo amon inculpate tutela*, as persons said to be present ; Therefore

a violent Pursuer might in such a case, of design to preclude the Pannel from his Defence, cite those present as accessory: Upon which account it is, that both Reason and Law provides, that if the Pannel does offer to prove a relevant Defence, by the *socii criminis* accused with him, the Pursuer must necessarily first proceed to the Tryal of these *socii*, who otherways would have been led as habile Witnesses; To the end, that being purged, they may be yet habile. This is so plain in Reason, and has been lookt upon as the constant Practice in all Criminal Procedures in the Justiciary Courts of Scotland; That it is admired the Fiscal should make any opposition to it.

He so far owns in his Pleading, that it is Form and Just upon the Matter, but would shift it in this particular Case, unless the Pannels would alledge and found upon a particular Ground of Exculpation, and offer to prove and instruct the same, as that the *Socii* cited as Witnesses were *alibi*: But this is altogether without Foundation. For in all Criminal Prosecutions, the Accused are not put to prove their Defences, because the denying of the Libel, is a Defence sufficient of it self, and if the Libel be not proven, the Pannel goes free by the Rule *Actore non probante absolvitur reus*. So that when there are Persons accused as *Socii Criminis*, who might be very habile Witnesses for Exculpating the rest, if they did not ly under the Imputation, when their Tryal is first required, that they may be purged of the Imputation, there is no necessity to propone for them any special Defence eliding the Libel; seing their very denial of the Libel is enough, and their Innocence is presumed except Guilt be proven. And if the Fiscal will have the Captain and the other Pannels to condescend upon what Ground the other *Socii* cited as Witnesses should be acquitted; they need say nomore, but that they ought to be acquitted, because the Libel is not true. And is there not the same reason to acquit Pannels, because the Libel is not proven? and consequently to render them habile Witnesses for other Persons accused, as if the said Persons were acquitted upon a Defence proponed eliding the Libel, whereby it plainly appears the Answer given is strained, and does mightily increase the Suspicion against the Fiscal, that he has indicted the Witnesses cited by the Captain and the other Persons in their Exculpation, of purpose to preclude them from their means of Defence, and the rather that the Pannels appeal to the Honourable Judges, if it was not owned by the Pursuer in the Debate, that Mr. Reynolds was a Shore at the time of the pretended attacke, besides that the Libel bears the Chyrurgeon & others of the Crew were a Shore the time of the pretended Action, which frees the Pannels of all Calumny. There can be innumerable instances given before the High Court of Justiciary in Criminal matters, That where there are several Complices indicted, if any of them have grounds of Exculpation, which they can prove by others of the Pannels, their Tryal proceeds first: This is plainly asserted as uncontested by Sir George Mackenzie, in his Book of the Laws and Customs of Scotland in matters Criminal, Tit. *Excul.* Par. 9. nor does he make any distinction, or requires that any special Defence should be condescended upon for purging *Socii Criminis*, to render them habile Witnesses. The Rule is plain in the prosecution of Delicts before Civil Courts, in order to repair Damages, that if more persons be Cited as *Co-rei ejusdem delicti*, and that some of them are necessary Witnesses for proving the Defences proponed for others; the proof must first proceed against these. And so was it found by the Lords of Session, the 24 February 1662. Mackartney against Irving: Much more ought it to be in Criminal Cases; As lately in Case of Ross of Auchnacloch against Captain Monro before the Lords of Justiciary. Nor is there any inconvenience from what is alleadged, that this should tend to elude all Criminal proceedings against Complices, and occasion the lengthening out of the Tryal to proceed to one single person after another

another; For as no time is to be grudged in the inquiry of such Matters which concerns the Life of Man, so the Pannels do not propone this preliminary Defence, to protract or delay the Tryal, and therefore are satisfied that not only *Reynolds*, but the others *Socii* indicted, who are likewise Cited in their Exculpation, go to the Tryal at one and the same time. The Captain and other Pannels with him do plainly argue thus; Either *Reynolds* and the other persons cited in the Exculpation are guilty or not: If they be guilty, it ought to be found so, for till that be, they are presumed innocent: If not guilty, what Law or Reason is there to preclude them from being Witnesses for the Captain and the other Pannels defence? Or what Law is there that can oblige them to condescend upon, and propone a particular Defence eliding the Libel, when the Lybel is not owned to be true, and that the Pannels have all denied the same? So it is hoped the Honourable Judges, and Lords Assessors will not preclude them from the ordinary Priviledge which hitherto has not been denied to any Pannel.

For if this were allowed, a violent Pursuer might prevent Probation, and render it impracticable. For suppose one Man kill another in Self-defence, two Gentlemen walking can testifie this; But to prevent the Probation of *inculcata tutela* they are cited as Parties; and they can prove by other two persons at a greater distance their *alibi*, which when the Pursuer gets notice of, they are made Parties also; and so *in infinitum*. So that the said violent Pursuer might prevent all Probation, if the Defender were obliged to alledge *alibi* for the Witnesses of his Exculpation.

The peremptory Defences proponed for the whole Pannels in both Lybels, as totally excluding the same as Irrelevant, are as follows:

1. **T**hat the Libel was irrelevant, as being general and indefinite, not condescending upon the Name, Designation, or any other Sign or Evidence, by which the Ship alledged to be seized might be particularly distinguished, nor yet the persons Names alledged to be murdered, or to whom the Ship and Goods robbed did belong; Which seemed to be absolutely necessary in all such Criminal Indictments, not only as a Requisite in Form, but in Equity and Reason, without which persons accused should be in great Hazard from general and indefinite Lybels, and precluded from their Means of Defence, which otherways are obvious, when the Accusation is certain, special, and pointed.

It was answered by the Pursuer, That he had lybelled also definitely and closely as the thing would allow, for it being lybelled that the Pannels did without any lawful Cause or Warrant attacque a Ship sailed by her own Crew, and having her own Cargo Aboard, and that they over-mastered the Ship in an hostile manner, and robbed the Goods: These were certain Crimes manifest in themselves, and if the Pannels acted them in such a manner, as to destroy the Ship and the Men, and imbazled the Cargo, so as no further knowledge could be had thereof, it was only an Aggravation of the Crime, and could not hinder the Accusation to proceed; Nor was any Condescendance here necessary for Exculpation, for of whatever Designation the Ship was, and whatever the Men and Goods were, yet the Crime was still the same, and that it was known

in our Practice, Robberies and Depredations are sustained, albeit neither the Quality of the Goods nor Owners be condescended upon, and in effect the Pannels Defence of Indefiniteness is such, that if in the Road of *Leith* before hundreds of Spectators, one Ship should invade another, destroy her Men, seize her Goods, and sink the Vessel, whereby none of all these could be condescended upon, there could be no Criminal Libel upon it, because of the Defence of Indefiniteness, which were most absurd.

It was replied for the Pannels, That what was said did not take off the Objection of the Indefiniteness of the Lybel, which by our Form and Law can be the ground of no criminal Accusation, for in all such Procedures, *debet constare de corpore delicti*; That is, that such a Ship is taken by Piracy, such Men are murdered, and the like; It is inconsistent with the Nature of a Criminal Accusation, that Men should be alledged to be murdered, Ships seized, and these not condescended upon, and by our constant Practice it is so required: Nor can it be instanced, that ever any such indefinite Lybel was sustained; There are no Questions whatsoever that are more nice, than these concerning the Life of Man; And therefore the *Englishman Cook*, 7 Rep. *Calvin's Case* observes, that an Indictment should be most curiously and certainly penned, and the old Books of the *Majestie*, requires several things to be specially exprest, as the Names of the Parties, Day, Year, Place, Cause of Complaint and Damage; And as it is necessary in Form, so this Form has been founded upon just Reason, for otherways these Inconveniencies should plainly follow from general and indefinite Libels.

First, A person indefinitely accused of a Crime, as for Example, of Murder, without expressing the person alledged to be murdered, can never be safe from any Absolution or Acquittal in Courts, for how can he oppose his Sentence *Absoluture* to a special Accusation that afterwards may be raised, seeing he cannot make the one meet the other: And if Captain *Green* and the other Pannels shall be now assolizied, this should not be a good Defence to them, neither in *Scotland* nor *England*, if they should be afterwards criminally pursued, for attacking a Ship, and murdering of Men specially condescended upon, because it is not clear, that the present Indictment as drawn, did concern these special Accusations; and therefore Accusations of that nature should be so special, as that afterwards the accused be not brought to any further disturbance.

2. The Reason why such Accusations should be special and definite, is, That the Pannels be not precluded from the obvious Defences, that tend to elide the Libel; as here in this Case, if the Libel were special and circumstantiated, and some Designation given of the Ship and Crew, it might be in their power to prove the obvious Defence, that such a Ship was at the time lybelled, in such another part of the World, that such a Ship was either cast away by Storm, or taken by Pirats in such a place, or that the Ship is yet extant, and the Crew alive: From all which the Pannels are precluded by a general and indefinite Lybel; And therefore Law has fixed the Forms in these Cases, that such Accusations be not vagrant and loose.

It will not be denied, but that the Time and Place must be exprest, and the same parity of Reason obliges to a special Condescendance of the Party injured, Damage sustained as relating to such particular Persons: And the above-cited Sir George *Mackenzie* in his Title of Lybels and the Forms thereof, does set down, that if the Defender crave the Pursuer to express the Day, because he offers to prove alibi, then the Judge should force the Pursuer to express the Day, or else the Defender would be precluded from proving his Innocence: The same Reason is, that the Pursuer here should be particular, as to the Ship alledged to be seized, &c. Because the Pannel might offer to prove that that Ship was alibi at the time; and many more Defences arise from the condescending upon the

Corpus

Corpus delicti, than from the Circumstance of either Time or Place; And this is not laid down conditionally, that these are not the Requisites of a Criminal Indictment, except first the accused propone their Defence, *verbi gratia, alibi*, but it is laid down as a Rule, that these are the Requisites of all Criminal Lybels; and the Reason given, is, That the Pannels be not precluded from their Defences: So that it is not more noticed, whether in this or that particular case this Defect is prejudicial, because necessity has first introduced the Form, and then this Form turns to be a Law in all such cases; And the fore-cited Sir George Mackenzie in the same Paragraph, thinks it so far a Requisite of a Criminal Lybel, that the Crime should be particularly subsumed, that he brings it as an Argument why it should be so, that it is declared by the 148 Act. Parl. 12. K. Ja. 6. That a Lybel bearing common regrating, or forestalling in the general shall be relevant, without condescending on the time or way of committing the same: And therefore concludes, that seing this was an Act dispensing with the regular way, *exceptio firmat regulam in non exceptis*: And hence it is not a good Argument, that the pursuer has libelled as definitely and closely as he could in the present matter: For better an inconvenience should be suffered in a Particular case, than that a dangerous preparative be laid down, of admitting indefinite and general criminal Libels, whereby poor Pannels may be precluded from their Means of Defence, and this will serve to obviate the Argument drawn from a very infeasible chance supposed to fall out in the Road of *Leith*, which as proponed, will likewise be otherways circumstantiated as to a positive Probation, and not founded upon Conjectures and Presumptions, as this case is: Nor can the Fiscal altogether excuse his indefinite Libel, seing the means was not wanting of his coming to the knowledge of the Ship, if it be true what is libelled, seing the Ship was not sunk, but Sold to a particular Person, and by some evidence of the Ship, the Crew might likewise have been known.

3. As Law and Form require such Libels to be definite and special, so more especially in this case, because Captain *Green* was clothed with a Commission under the broad Seal of *England*, which impowered him to act in hostility against all Pirats; and therefore a general and indefinite Libel, upon attacking and seizing a Ship in this case, would seem very improper; for the Presumption must run in his favours, that if any acts of Hostility were done by him, they must be presumed to have been done in prosecution of his Commission: This is not pled as a separat Defence to elide the Libel, nor is it pled to have given him full liberty to have ranged *impune*, but as a speciality in his case, that as it is a Defect in all Criminal Libels to be general and indefinite, so much more in this Libel, he being clothed with a Commission, and having power to assail: And therefore, the Presumption runs in his favour, except the particular Ship were condescended upon, known to be a Merchant and Trading Ship, and consequently, he out of his Duty in attacking the same: And therefore it is frivolous to object, that the Commission obliged him to keep a particular journal, of whatsoever Vessel he should attack hostilely, seing the attacking of any Vessel whatsoever is denied, and the Argument from the Commission, only pressed, to this end, that no indefinite Libel of attacking of Ships, is relevant against a Person clothed with a power to attack in certain cases, and which the Accuser was so far convinced of, that for supplying that defect in his Libel, he in his Pleading and Information, is pleased to condescend upon this special Qualification and mark of the Ship attacked, that she was a free Ship, which therefore he is obliged to prove.

The Pursuer was at the pains to Defend his Lybels from an Objection, as if they had wanted time and place; The Pannels did indeed conjoin this with the other, That as the determining the time and place seemeth to be absolutely

requisite ; So likeways the condescendence upon the particular Names, and Designations of the Ship and Person, both being equally and necessarily required, that Pannels be not precluded from their just Defences. And the time Lybelled, comprehending the space of four Moneths, being too indefinite, it is likeways reasonable in such a Case, that the Accuser should be more special, which the Pannels humbly remit to the Honourable Admiral, and Lords Assessors.

The second peremptor Defence proponed for the Pannels, was, That this being a Lybel founded upon several Qualifications and Presumptions, the same was no ways relevant to infer the Conclusion of the Lybel; a proof of Crimes from Presumptions is very hazardous, and hence it is, that some Forraign Nations do not condemn to Death upon *indicia*, but makes them only ground to put to the Question : And very many Lawyers are of Opinion, that the ordinary pain of Death is not to be inflicted upon a proof arising from *indicia*, tho never so pregnant : Of this Opinion is *Pharinacius* a great Criminalist, and several others, and so is *Brannemanns ad l. ult. cod. de prob.*

But in the next place, Whatever diversities of Opinions, and practices of Nations may be in this point, yet it is certain, where *indicia* are taken as a proof, in order to Punishment by Death, they must be such as amount to a full proof, and leaves no room for any scruple or doubt. This cannot be better exprest than the Words of that excellent Constitution of *Theodosius* the Emperour, *l. ult. cod. de prob. Sciant cuncti accusatores eam se rem de ferre in publicam notitiam debere, qua munita sibi idoneis testibus, vel instructa apertissimis documentis, vel indiciis ad probationem indubitatis, & luce clarioribus expedita.* And it will plainly appear from the Lybel, that the Qualifications therein narrated, are not such *indicia*, as that excellent Constitution requires, *indubitata, apertissima, luce clariora.* There must always a difference be made; some have a probable shew, and incline the mind of the Judge, and yet cannot go the length of a full proof, *l. 5. in principio Pand. de penis — Sed nec de suspicionibus debere aliquem damnare, satius enim est impunitum relinqui facinus nocentis, quam innocentem damnare. Indicia & presumptiones* have much easier place, where *constat de corpore delicti*, because this helps to sustain the presumption, and gives indeed the *indicia* their just Weight ; But these in such a case as this, *ubi non constat de corpore delicti*, are hardly receivable, seeing they want to be applyed to a particular Crime.

This so necessar a Qualification of a Criminal Lybel, *ut constet de corpore delicti*, the Pursuer indeavoured to evade, by distinguishing betwixt Crimes, that are *cum effectu permanente*, and such that have no permanent effects. In the First, the *corpus delicti* was necessary, not in the latter, and therefore subsumes, that in the Cases Lybelled, there could be no permanent effects, because all are Lybelled to be destroyed, and put out of reach : But plainly this distinction is against the Pursuer, because certainly Piracy, Robbery and Murder are such Crimes as have permanent effects. By the *corpus delicti*, is not meant, that the subject of the Crime must be so extant, as to fall under the senses, but that the loss sustained is felt and known ; as for Example, in the Crime of Murder, tho the Body cannot be reached, yet the particular loss is known : It is nottour the Queen wants a Subject, Friends want a Relation whom they can point out ; in Piracy and Robbery Merchants want their Ship and Goods, so that the loss is felt and known, tho *de facto* the subject cannot be pointed out, whereas in this case, no such particular evidences can be given, none can complain of any particular loss, either Queen or Subject, and this is the true meaning of what is *corpus delicti*, and whatever be the import of the Objection against the Lybel, yet it is certain, to alledge Qualifications as the proof of a Crime, *ubi non constat de corpore delicti*, is most incongruous.

And

And granting, as the Pursuer does further contend, that he has Lybelled a *corpus delicti*, in so far as, he has lybelled a Criminal Fact and Deed of Piracy, Robbery and Murder, which still being general; is not that *corpus delicti* that Law requires: Yet it was never heard, nor can there be any Lawyer whatsoever adduced, that owns the *corpus delicti*, can be made out by presumptions and qualifications: When once it is known, that a Crime is committed, it may be owned, that *indicia indubitata*, such as Law requires, may be a ground to fix the guilt upon particular persons, because there, the certainty of a Crime committed, does inforce and give weight to the presumptions adduced; but when it is not known that a Crime is committed, and that this is first to be made out, it is positively contended, this cannot be but by a positive probation of concurring habile Witnesses; for presumptions may be apt to fix a Guilt *quando constat de corpore delicti*, or that the fact was done, but not before.

In the 3^d place, The presumptions lybelled, are very far from being of that nature, as to be concluding to a conviction, and of that certaintie and clearness as Law requires; all probations in Criminals should be infallible, and certain, and if there be any meaning put upon presumptions founded upon, for proving a Crime, other than to infer a Crime, that is to be laid hold upon according to the manifest principles of Law and Humanitie: Now the Qualifications lybelled are either such as not only can bear an obvious sense different from what is imposed, but even a probable one, or such as are vagrant expressions and hear-says, importing little or nothing, and cannot be applied to the Crimes lybelled.

1. The Chyrurgeon his having heard Shooting at a distance, while in the mean time he saw no Ingagement, can easily be applyed, either to Shooting from other Ships, or Shooting upon Salutation, &c.

2. That he did see the *Worcester* riding in her Birth, and another Ship, as it were, towed to her Stern; 1. It is only conjecture, being at such a distance. 2. It is improbable, because it is not the ordinary way, and hazards the Ship's falling foul of one another. And 3. It is very usual for two Ships to Ride near to one another in such common Roads, which might be a ground to the Chyrurgeon's mistake at such a distance.

3. That he did see the Goods lying Lumbered upon the Deck when he came Aboard, *First*, It is usual in Coast-Trading, that the Goods are brought by Sloops, and so laid upon the Deck till they be stowed. 2. This might be occasioned by the Ship's drawing Water. And to what concerns the word *Busking, and bringing Water from the Shore*, it is taken notice of in the Exculation.

4. That when the Doctor inquired what was the occasion of the Goods lying in confusion, Captain *Madder* should have answered, — *Damn you*, &c. might proceed from the said Captain *Madder's* being in a passion, and concerned for the Goods being Damned, and a Tarpallion temper very usual among Seamen.

5. That the Chyrurgeon did dress two wounded Men, first, one is Dead, another is not named in the Lybel, and the *Black*, as the other two also, might have got their Wounds by fighting among themselves, which is not unusual, and the rather that they appeared unwilling to tell the Chyrurgeon, of purpose to conceal their Quarrel from the Captain.

6. As to what is alledged to have occurred betwixt the Doctor and the Linguister, *First*, It is only hear-say. In the second place, there might be a Ship Sold to *Coge Commodo*, but not taken by Captain *Green*, and it is improbable he would have bought any Ship taken by Piracy upon that Coast.

7. What is Lybelled about *Reynolds* and his Sister their missive Letters, is far from being any Qualification. For *First*, *Reynolds* Letter is only a Double. 2. It is strained to put such a Gloss upon the expression (*basely Confess*) to imply a Guilt, and a Guilt confessed, seing the words may very easily bear the meaning of a false Accusation, and is explained by a subsequent expression, That he would rather die Innocent, than Accuse any Man falsely; and in the beginning of the Letter, declares he knew nothing of the matter.

8. What relates to *Hains* his Intercourse with *Anna Seton* and others, are nothing but general and ambiguous Expressions, from which nothing can be gathered of the Crimes lybelled, and infers no more than that he was using some stratagems to gain his Mistriss.

And as to the Expression of the Wickedness committed Aboard their Ship, may easily relate to other Crimes which are but too frequent in such Voyages. As also, as to what was done Aboard after the Ship was in the Harbour; and as to the lybelled Expression used by *Hains* against Captain *Madder*, as the same is general and indefinit, relating to no particular Crime, so this might arise from some particular Pike and prejudice against Captain *Madder*. As to what follows anent the condition of the Cargo, when the Committee of the Council Unloaded the Ship, it is sufficiently taken off in the Exculpation.

Lastly, As to what is lybelled anent the *African* Companies Seal, *First*, It will not be pretended, that the Company were in use to give their Seal to any Ship whatsoever Trading by their Commission. 2. If any had casually got the Seal, there are an hundred ways whereby the same might have come to the *Worcester* Crew without Piracy. And 3. The Seal found Aboard and which is lying in the Clerks hands, which has a Ship for its Crest, might have given occasion to this mistake.

It being plain, that the Qualifications lybelled, are not of that import to give a full Conviction, The Pursuers Argument adduced from the end of Probation, which is to find out the Guilt, and convince of the Truth, may be plainly taken off, that there is no such convincing proof, as can fully and certainly determine any Judge, but at most resolves in a conjectural Proof, never to be admitted to take away the Life of Man.

The Pursuer allows, that if every one of the Circumstances should be taken separatly, they would not be sufficient; but being taken jointly, and according to the series of the thing, they amount to a full Proof and Conviction, and this is the nature of all cumulative Probations, which is not to be disjoyned, *Qua non prosunt singula, multa juvant*: The Pursuer does likewise adduce Arguments and Authorities for a cumulative Probation, to be of this nature, that there needs not two concurring Witnesses for every Circumstance. In answer to which, the Pannels do still plead, there is a great difference to be made betwixt Cases where previously *constat de corpore delicti*, and that presumptions are only fixed upon to find out the Guilty; and these cases where in general a Crime is Lybelled, altho presumptions may be admitted in the first, yet never in the other, as is already observed. 2. In all Cases, Presumptions must be such as leave no room to doubt, and must not only have a probability with them, but a concluding certainty, which does not give ground to Suspicion, but plainly and firmly convinces, which certainly cannot be inferred from the Qualifications Lybelled, all which either can bear a different construction, or such vagrant hear-says, and indefinit expressions, as amounts to no certain and special Crime. 3. Such Presumptions cannot be conjoyned, which particularly taken, are either of small weight, or amounts to very little, or that they can probably bear another sense and meaning as has been demonstrat. And 4. As to the conjunction of a cumulative Probation,

tion, there is a difference to be made betwixt Crimes that are continued, and where the Proof may be had from the Reiteration of the Acts, and these other Crimes which consist only in Fact or Deed.

In the first, a cumulative Probation may be admitted, as in a Libel of Bribery, one Witness may be admitted for one Fact, another for another, and so a third, which may conjoin, altho' there be not two concurring for every particular Fact, if there be other concurring Evidences and Arguments: But where there is one positive Fact libelled, this does not so easily admit of a cumulative Probation, especially (which is always to be taken along) where the Crime is not specified and determined as in this Case, and that the *ipsum corpus delicti* is still to be made out; So that the Texts of the Law, and Authorities made use of by the Pursuer may be easily cleared, that either they relate to civil Cases, as *l. 3. Par. 2. digest. de testibus*; Where there must be a preference of a civil Right of the one to the other: - Or if the Texts and Authorities relate to Crimes, the *indicia* allowed by them must be *indubitata & luce clariora*, and do presuppose a Crime committed, and *corpus delicti*, and tend only to fix the guilt: And it is positively denied, that there is any Law or Lawyers allowing any cumulative Probation to prove a Crime in general, *ubi non constat de corpore delicti*; and this is a Speciality in the case of the present Pannels: And the Honourable Judge, and Lords Assessors, are earnestly intreated to consider it, which does really distinguish them from the other Cases mentioned by Lawyers; All which relates to Delicts actually committed, and that the Presumptions deduced tend only to fix the Guilt: But when a Crime is alledged in general to be committed, and no special Condescendance upon what Subject, upon whom, and against whom, Presumptions there, are not sufficient, without concurring habile Testimonies; even supposing such a general indefinite Libel could be relevant, against which there are abundance of Arguments already given; for unless a Fact be proven, even Confession is not sufficient to fix a Guilt, as must be acknowledged by all; much less Presumptions except the Fact be once known.

The Grounds of Exculpation.

AS the Pannels are confident, that the Lords Judges will not find the Libels so general and so qualified, relevant to infer the Pains of Death; So, for further clearing their Innocence, they offer the Grounds of Exculpation following, which are either instantly instructed, or offered to be proven.

And this may be laid down, which cannot be denied, that *presumptio non delicti, excludit presumptiones delicti*, to which purpose. *Carpz. Part. 3. Qu. 123. Num. 69.* and in the same place, *in dubio semper in mitiorem partem est presumendum*, where he cites multitudes of Lawyers.

1. There is no reason to suspect the Pannels of the Crimes libelled, being persons of intire Fame, without any Imputation as to their antecedent Life.

2. That they were under a Charter-party, commissionat to a Trading Voyage, and insurance made upon Ship and Cargo, which does remove all Suspicion of Piracy, seing such does ordinarily associat, and out-rig themselves for that end.

3. A strong Argument of the Pannels Innocence as to Piracy, is, That they were upon their Voyage home-ward, to make account to their Fraughters and Owners of their out-ward Cargo and Returns, of all which they have exact Journals and Accompts, and upon their coming to *Frazerburgh*, gave Advice to their Owners of their Arrival, which was insert in the publick Prints from *London*, as is usual, and likewise sent a Pacquet over Land from *Frazerburgh*

to the *African Company* in *Scotland*, from *Mr. Innes* their Correspondent in the *East-Indies*, which is not to be supposed a Pirat would be intrusted with; Whereas, when such turn Pirats, it is usually for their own profite, and so not only rob others, but begin first with their Owners, and are not found to return to make any such Accompts, which is a stronger Proof of the Pannels Innocency, than any Circumstance libelled to the contrary.

4. *Menochens de presumptionibus, lib. 5. Presf. 59.* Treating of the Presumptions of Innocence, lays down two very pregnant, First, That if the guilty Person could flee, and did not, that very Presumption washes away the Guilt: And gives account of a case out of *Lucian de amicitia*, that *Antiphilus* and *Demetrius* being accused of Sacrilege, were dismissed by the Prator, because when they could have fled, they did not. A Second, *When the accused Party offers himself to the Judge, it is a strong presumption of his Innocence, since the Innocent fear nothing, and the guilty have always the punishment before their Eyes.* Both these favour the present Pannels, for the Rumour was spread, and came to their Ears some Weeks before they were imprisoned, and yet none of them offered to flee; and one *Ballantine* being at full Liberty amongst his Friends the time of the Incarceration of the rest, did of his own accord offer himself to Prison.

5. That the alledged Confession made by the Chyrurgeon, must certainly labour under some Mistake; Because, altho he mentions the Attack to have been at *Callicut*, and that he heard the Ship was sold at *Keilon*, which are at least Fifty Leagues distant, and altho he was Aboard all the time, yet he makes no mention how the Ship was brought along, or any thing relating to it.

6. It is offered to be proven, that the *Black* who is alledged to be wounded in the Action, was not aboard 48 Hours before the *Worcester* sailed from the Coast of *Malabar*. And further, that the *Black* declared when he came aboard, that he got the Wound in his Arm by the Bite of a *Snake*. And further, it can be instructed by Chyrurgeons, that the Wound as it well appears, is more probable to have been got that way than by Gun-shot.

7. It is impossible a Piracy of that nature could have been committed upon the Coast of *Malabar*, and not certainly known in *England* long before the Arrival of the Ship; Such is the exact Correspondence, especially as to such Matters; nor could the Captain either have traded upon the Coast, or been received by the Factors and Governours there, if he had committed any such Piracy; whereas it is offered to be proven, that after the time libelled, he was ashore kindly Entertained, exchanging Letters with the Governour of *Anjango*, and had Instructions and Recommendations from thence to the Governour of *Fort-William* upon the Coast of *Bengall*, whither he was obliged to go for Re-fitting his Ship, and stopping the Lake, which he could not conveniently do at *Malabar*, because of the want of Timber, Cordage and Money to be taken up upon Bottomrie.

8. It was asserted by the Fiscal in the Time of the Tryal, that the Action lasted two days and a half, which is a most improbable Storie, for either the Night would have separated, or the Ship attacked might rather have run ashore, than fall into the Hands of Pirats.

9. That the Word *Busking* libelled as a Term, signifying a Ship preparing to Fight, has a quite different Construction in the ordinar Acceptation among Sea-men, and signifies, bearing clofs upon the Wind by a press Sail.

10. It is offered to be proven, that their Water was staved on the Coast of *Malabar* in a Storm, and not by *Busking* as is libelled.

11. And to redargue the Circumstance libelled, that the Goods were not right Stowed; It's acknowledged the Ship was six Months in a Harbour at *Bengall* after the libelled Engagement, and there Loaded and Unloaded; So that they had all opportunity to stow the Goods as they thought fit, and certainly

tainly they were stowed as such Goods usually are, which cannot be prest without Damage.

12. That the whole inward Loadning does not amount to a Value beyond what might be reasonably expected from the outward Cargo, in a Trading Voyage to these Places.

And *Lastly*, That in *January* preceeding the time of the alledged Action, there was a Protest taken by the Pannels against the Governour of *Cochin*, for not allowing the Ship *Worcester* to be Re-fitted there, which she extreamly needed before she could return to *Europe*, and so was in no capacity, either to Fight or take a Ship, (as is libelled) in the Months of *February, March, April* or *May* thereafter, and was a Ship sheathed with Lead, and therefore altogether unfit for such an Action; as also a slow Sailer, and has not the least Mark of any Gun-shot upon her.

So that upon the whole Matter, the Qualifications libelled, being so weak and conjectural, and the Presumptions of Innocency, so strong upon the other hand; It is confidently expected, that the Honourable Judge and Lords Assessors will reject the Lybels, and let the Pannels go free, which they expect from the Justice of the Nation, and the Humanity with which they are in use to treat all Strangers.

An ANSWER to the Fiscals Citations; With the Counter-Citations for the Pannels.

THO' the Doctors differ about the Force of Presumptions, and the Effect of Probation *ab Indiciis & Argumentis*, yet they all agree, that Paralels drawn from Civil Causes to criminal Ones, are not universally to be admitted. Now the Fiscal cites *L. 3. §. 2. de testibus*, for evincing that Presumptions, *Indicia & Argumenta*, are to be received.

This Law is taken out of the fourth Book *de Cognitionibus*, written by *Callistratus*, the which Book only treats of Civil Cases, as is manifest from the Title of that Book, dispers'd in the *ff.* and congested by *Labittus*, to which I refer. Wherefore this being a Rescript of the Emperor *Hadrian*, in a civil Cause, can never be applyed in a Criminal One.

The next Citation is, *l. 22. C. ad l. Cor. de falsis*, which is a Rescript of the Emperor *Constantine* to the Governour of *Rome*, about a forged Writ. Now as the Law says, such Forgeries can only be discover'd by Collation of Writs, Arguments inferr'd from thence and Witnesses; And it is well known that in our Law, we have two ways of Improbation, the Direct and the Indirect. Now to apply that to the Crime of Robbery or Murder, which must be proven *Liquidissime*, and not by Writs, seems very Anomolous. Besides, Crimes according to their different Nature, must be diversly proven, some by Ear-witnesses, as Blasphemy, Heresy, Cursing of Parents, &c. Others by Eye-witnesses, as Robbery, Murder, &c. and the Witnesses competent for proving the one Crime, are not so in the other.

The third Citation is out of *Antonius Mathæus de Criminibus, ad lib. ff. 48. tit. 15. C. 3. N. 4.* The Fiscal cites the latter end of this Section, but omits to set down what the Author refers to in the *C. 6.* of that Title, the doing whereof will serve for an Answer. The Position is, *Unus testis non est audiendus, at si argumenta alia concurrant, audiendus est.* Now these *argumenta* must be taken out

of the C. 6. of that Title. *Argumentum nihil est aliud quam ratio quæ rei dubie facit fidem, & est vel necessarium vel contingens. Necessarium, cujus consequentia necessaria est, veluti coivisse eam quæ peperit, furtum fecisse, qui rem furtivam efferens deprehensus est. Contingens, cujus consequentia probabilis est, veluti, eadem fecisse, qui cruentatus est.* The necessary Argument obtains, in Criminal as well as in Civil Cases; But the contingent one, which the Lawyers call a Presumption is not of such force; However, our Author is of Opinion, that *Contingentia Argumenta quanquam singula fidem non faciant, plura tamen conjuncta crimen manifestare possunt.* Rem-uno atque altero exemplo declarabimus, *occisus est calendis Mevius, Titius perempti inimicus fuit, eidem sepius non solum interminatus, sed & infidiatus est, cum deprehenderetur iisdem calendis in loca cædis, cruentatus, cum gladio cruento, ad mensuram vulneris facto toto vultu expalluit, interrogatus nihil respondit, trepide fugit.* Hic singula quidem argumenta infirmiora sunt, universa tamen cædis autorem Titium evidenter designant. Simile est illud, *Clodius cum Pompeia, nudus cum nuda reperti sunt in eodem cubili, præterit id momentum quo turpitudine perfici potuit.* Jam olim ille mulierem deperibat, ad stuprum per literas sollicitaverat. Quis dubitet utrumque adulterii damnare? Now there being in the present case no such Presumptions as these are; The Rules laid down by this Lawyer Mathens. shew the Circumstances lybelled are not relevant.

The fourth Citation is from *Gail. l. 2. Obs. 66. N. 12.* The setting down of the Title of the Observation, which is, *Jus venandi an servitus sit realis, vel personalis,* and also the Apostile of the §. which is, *in materia decimarum testes singulares probant,* does shew, that the Matter there Treated is Civil, and not Criminal. And many things are allowed in civil Cases, which are not in Criminals. *A. Mathens ad lib. ff. 48. tit. 15. de probationibus, Cap. 2. Num. 1. Quicumque testes in causis civilibus esse non possunt, iis nec in Criminalibus testimonii dictio est: at non contra, quicumque in causis civilibus audiuntur, ii etiam in criminalibus audiendi sunt. Graviora enim criminalia judicia civilibus sunt, ideoque & testimonium major delectus adhibendus est.* And the Author illustrates this Doctrine by Examples set down in that Chapter.

What has been said, will serve to Answer what is cited out of *Giurba* and *Mascardus*.

The Citation from *Carpzovius's Criminal Practicks, Q. 123. N. 57.* is imperfectly excerpted: For I shall give no other Answer, than what is in the same place from *N. 55. to N. 59.* *Probantur etiam Indicia ad Torturam per unicum Testem, in Casu quo plura Indicia simul concurrunt, super quibus Testes examinati diversimodè deponunt, ac unus de uno, alter de alio, tertius etiam de alio testificatur; Tum enim omnium Testificatio simul junctæ verisimiliter facit de Reo, qui propterea sub tormentis interrogari potest. Etsi enim hac de re non omni ex parte Interpp. conveniant, nec desint qui Assertionem hanc simpliciter rejiciant, Testesque hosce, ut singulares conjungendos non esse autment, eo quod singuli Testes haudquam fidem faciant; Verissimum tamen est, plures imperfectas Probationes in causis Capitalibus conjungendos esse ad plenam Probationem faciendam, quoad effectum Torquendi: Quod Communiter Dd. placuisse, licet namque unicum Judicium ab uno Teste probatum, Semiplenam Probationem & Fidem ad Questionem de Reo habendam non faciat; Secus tamen res se habet, si plura indicia concurrant, & conjunctim Reum aggravent, quorum unumquodque per Testem singularem probetur. Nam una Presumptio aliam adjuvat, plurimæque Indicia conjuncta Fidem faciunt.*

Quod ipsum tamen non aliter accipi velim, quam hisce tribus concurrentibus. Primo, ut Testes sint omni exceptione majores & Idonei ac Vitæ Probata. Secundo, ut deponant super Indiciis proximis delicto, non etiam super valde remotis Indiciis. Tertio, Indicia super quibus Testes isti singulares deponunt sunt plura, & talia quæ reddunt Animum Judicis quasi certum quod Reus deliquerit; Quorum alterutrum si deficiat, nullum in Jure habeant Effectum.

The Presumptions in Swinton's Case were not in the Indictment, but in the Probation, and seem to have been very pregnant and near, whereas these lybelled against Captain Green are most remote.

But to put this matter in its true Light, the Honourable Judge and Assessors are desir'd to Remember, That Presumptions never respect the Delict, or the *Corpus Delicti*, but the Delinquent, and the Person of the Accused: For as *Menoch. de Presumpt. L. 1. Q. 8. N. 2.* very well says, *Presumptio versatur circa id quod gestum est, sed ignoratur qualiter gestum.* Now, in the Opinion of all Lawyers, *Delictum debet esse manifestum.* *Julius Clarus, Sententiarum Lib. 5. Q. 4.* *Sciendum est autem quod in omnem Casum nunquam debet Judex procedere ad aliquem actum, nisi prius illi constet Delictum ipsum fuisse commissum.* And in that place, illustrates this Doctrine by Examples, and the Authority of other Lawyers, to which I refer. His Sentiment in the end of that Question being, *Et ubi constet Scelus non intervenisse, silebit Processus.*

So that *ubi constat de delicto*, the Doubt and Controversie arises about the Delinquent, so as it is uncertain who is the person Guilty, or the Committer of this Crime, whether it be Robbery, Piracy, or Murder. Those who admit of Probation *per Indicia & Argumenta*, distinguish these into *Proxima & Remota*, and to each of them give a different Effect in Law. *Carpz. Q. 120. N. 6.* *Indicium definitur argumentum delicti perpetrati demonstrativum, seu Indicativum. Idem, Q. 121. N. 1.* *Indicia propinqua ac certa, quorum unumquodque per se sufficit ad Torturam. Hujus generis Indicia non verisimilia ac probabilia sed certa, non levia aut perfunctoria sed urgentia, non dubia aut equivoca, quae multipliciter interpretari queunt, sed concludentia, & ad Delictum inferentia sunt, & Crimini quasi inhaerent, ita ut iis apparentibus, nihil nisi Rei Confessio deesse videatur.* And *N. 14. & seqq.* *Ut Indicium semiplena Probationis per se solum sufficiens & idoneum sit ad Torturam tria requiruntur, 1. Ut Testis ille unicus sit omni exceptione maior. 2. Ut hic Testis deponat de actu immediato, quod fieri intelligitur, si Testis suae assertionis rationem per sensum corporeum rei convenientem reddat, quod nempe ipsemet Delictum ab accusato perpetrari viderit vel praesens interfuerit. Quare, si Testis non de ipso Crimine deponat, sed de aliquo actu ad Delictum proxime accedente, Indicium sufficiens non facit. Sicuti nec illius Testimonium idoneum ac sufficiens est, qui deponit de Delicto, quod in oculos cadit, & rationem reddit de alio sensu. 3. Ut Testis verbis dilucidis & indubitatis de Crimine testificetur.* After which our Author gives Examples, and it is to be observed, That these *Indicia* are requir'd in order to Torture; for they are not, in this Authors Opinion, sufficient to Condemn, unless they be *Certissima, Indubitatissima, & Luce Meridiana Clariora*, in which Case they have the Effect of a compleat Probation.

The *Indicia Remota*, which are also term'd, *Dubitata, Semiplena, quae rem veram esse arguunt, non semper sed plerumque tantum, unde etiam non dicuntur simpliciter certa Indicia, sed verisimilia & probabilia, seu veluti certa Indicia.* And these Cumulatively and in great number concurring, may bring a Person to Torture, but never to Condemnation.

Now, by applying this general Doctrine to the Indictment, it is *Juris Incontraversi* that the *Delictum* it self, cannot be proven *per Indicia & Presumptiones*: And as to the Pannels, tho a Delict were proven *per Testes omni exceptione majores*, yet it will appear, That the Circumstances lybelled, do not deserve the Name of *Indicia*; and tho they should be allow'd that Compellation, yet they are, *Remotissima*, and by consequence, can have no Effect as to Condemnation.

As to the Additional Conclusion, that the Ship and Cargo should be Escheated, the Fiscal cites a wrong place, and supposes the case to be what it is not: But seeing he values Mr. *Molleys* Authority so much, his Opinion

in this matter, as exprest in the same Treatise, C. 4. §. 21, 22. is thus, By the Law *Marine*, if Goods are taken by a Pirate, and afterwards the Pirate attacks another Ship, but in the attempt is conquered, the Prize becomes absolutely the Captors, saving the account to be rendered to the Admiral; and it is accounted in Law a just Caption of whatsoever may be got or taken from such Beasts of prey, be the same in their own or in their Successors Possession. But then an account ought to be rendered to the Admiral, who may (if they happen to be the Goods of the Fellow Subject of the Captors, or of Nations in Amity with his own Sovereign) make Restitution to the owner, the Costes and Charges, and what other things in Equity shall be decreed to the Captor, first considered and deducted.

§. 22. By the Statute 27. *Edward 3. Cap. 13.* If a Merchant lose his Goods at Sea, by Piracy or Tempest (not being Wrackt) and they afterwards come to Land, if he can make Proof they are his Goods, they shall be restored to him in places Guildable by the Kings Officers, and six Men of the Countrey.

This Lavv; hath a very near Relation vvith that of the *Romans*, called *de Usucapione*, or the *Atinian Lavv*; for *Atinius* enacted, That the Plea of Prescription or long Possession, should not avail in things that had been stollen, but the Interest that the right Ovvners had, should remain perpetual: The Words of the Lavv are these, *Quod surreptum est, ejus rei Aeterna auctoritas esset.* Where by *Auctoritas* is meaned *Jus Dominii*.

CURIA JUSTICIARIA

Suprema Curia Admi-

ralitatis tenta in Prætorio, vel nova Sessionis burgi de Edinburgo, decimo tertio die Mensis Martii 1705. per Judicem dictæ Curie, & per honoratissimos viros Joannem Comitem de Loudoun, Joannem Dominum de Beilhaven, Dominos Robertum Dundas de Arnestoun, Joannem Home de Blackadder, & Joannem Cockburn de Ormiston Assessores.

Curia Legitimè Affirmata.

Intran.

Captain *Thomas Green* Commander of the Ship called the *Worcester*, now in *Bruntisland Harbour*.

Captain *John Madder* Chief-mate of the said Ship.

John Reynolds Second-mate of the said Ship.

Thomas Linsteed Assistant to the deceased *Supercargo* of the said Ship.

James Burn Boatswain of the said Ship.

James Simpson Gunner.

Andrew Robertson Gunners-mate.

John Bruckly Seaman.

George Kitchen Seaman.

Henry Keigle Carpenter of the said Ship.

George Haines Steward of the said Ship.

Samuel Wilcocks Chyrurgeon's Mate.

George Glen Seaman.

Alexander Taylor Seaman.

And *John Bannantyne* Seaman in the said Ship.

All of them Indicted and accused at the Instance of Mr. *Alexander Higgins* Procurator-fiscal to the High Court of Admiralty, for the Crimes of *Piracy, Robbery* and *Murder*, in manner mentioned in the two several Indictments raised against them thereanent, before insert in the Court holden the fifth of March instant.

PURSUERS.

Mr. *Alexander Higgins* Procurator-fiscal.
 Sir *James Stuart* Her Majesties Advocat.
 Sir *David Dalrymple* and Mr. *William Carmichael* Her Majesties Solicitors.
 Sir *Patrick Home*.
 Sir *Gilbert Eliot*.
 Mr. *Alexander Mackleod*.
 Mr. *Francis Grant*.
 Advocats:

Procurators in DEFENCE;

Sir *David Thoirs*.
 Sir *Walter Pringle*.
 Mr. *David Forbes*.
 Mr. *George Alexander*.
 Mr. *John Elphinstone*.
 Mr. *John Spotswood*.
 Advocats:

The Libels and Informations for both Parties being read over in presence of the said Judge and Assessors, and in presence of the Pannels and Assizers,

The Judge and Assessors having advised both the Indictments pursued by Mr. *Alexander Higgins* Procurator-fiscal of the High Court of Admiralty, against Captain *Thomas Green*, and the haill Pannels in both Indictments, with the forgoing Debate thereupon; They find, that *Keigle* and the other Pannels in the first Indictment cannot be delayed in their Tryal, on pretence, that Captain *Green* as their Commander ought to be first discusst; And therefore repell the first dilatory Defence: And find, that *Reynolds* being lybelled against as *socius criminis*, and there being no Speciality or particular Ground of Exculpation proponed, why he should be previously tryed, therefore repell the second dilatory Defence proponed for Captain *Green* and these in the Indictment with him, and repell the Objection against the generality of the Indictment, in regard of the Nature of the Crimes: And find the Crimes of *Piracy*, or *Robbery* or *Murder*, as libelled, being proven by clear and plain Evidence, relevant to infer the pains of Death, and Confiscation of Moveables, reserving the Consideration of the additional Conclusion of the Libels until the Verdict of the Assize be returned; and repell the other Defences proponed for the Pannels, and remit the whole to the knowledge of an Assize.

ROT. FORBES I. P. A.

The Judge of the High Court of Admiralty and Assessors continue the Dyet at the said Mr. *Alexander Higgins*'s instance, against the foresaid haill Pannels till to Morrow, being the Fourteenth instant, at eight a Clock in the Morning. And Ordains the Assizers and Witnesses to attend then, ilk person under the pain of 200 *Merks*, and the Pannels to be carried back to Prison.

K

Curia

CURIA JUSTICIARIA Suprema Curie

Admiralitat tentata in Pretorio vel nova Domo Sessionis Burgi de Edinburgo, decimo quarto die Mensis Martii 1705. per Judicem dictæ Curie, & per Honoratissimos viros Joannem Comitem de Loudoun, Joannem Dominum de Beilhaven, Dominos Robertum Dundas de Arnistoun, Joannem Home de Blackadder, & Joannem Cockburn de Ormiston Assessores.

Curia Legitime Affirmata.

Intran.

Captain Thomas Green Commander of the Ship called the Worcester, now in Bruntisland Harbour.

Captain John Madder Chief-mate of the said Ship.

John Reynolds second Mate of the said Ship.

Thomas Linsteed Assistant to the deceased Supercargo of the said Ship.

James Burn Boatswain of the said Ship.

James Simpson Gunner.

Andrew Robertson Gunners-mate.

John Bruckly Seaman.

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Alexander Taylor Seaman, and

John Bannantine Seaman in the said Ship.

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Sir Gilbert Eliot.

Mr. Alexander Mackleod.

M. Francis Grant. Advocats.

Procurators in DEFENCE.

Sir David Thoirs.

Sir Walter Pringle.

Mr. David Forbes.

Mr. George Alexander.

Mr. John Elphinston.

Mr. John Spotswood.

Advocats.

Affize.

Archibald Drummond Skipper in Leith.

John Findlayson Skipper in Berrofstounness.

Mark Stark Skipper there.

James Jamison Skipper in Queensferry.

John Mathie Skipper in Prestounpans.

James Marjoribanks Merchant in Edinburgh.

Edward Marjoribanks of Halyards.

Sir James Fleeming of Rathobyres.

James Gordon Senior, and

Robert Forrest Merchants in Edinb.

Robert Innes.

Robert Walwood.

William Blackwood.

George Clark and

William Neilson Merchants in Edinburgh.

The

The Affize lawfully Sworn, and no Objection of the Law in the contrary.

Mr: Alexander Higgins the Pursuer, for Probation, adduced the Witnesses after Deponing, viz.

Compeared *Antonio Ferdinando* Cooks Mate of the Ship the *Worcester*, which was Commanded by Captain *Thomas Green*, Aged twenty four Years or thereby, unmarried; with Captain *George Yeaman* Merchant in *Dundee*, Sworn Interpreter: And the said *Antonio Ferdinando* being solemnly Sworn, purged of partial Counsel, Examined and Interrogat upon the Libels or Indictments. And being Interrogat if he Believed in GOD, and if he was a Christian, *Depones*, That he believes in GOD, and that he was Born of Christian Parents, and is a Christian himself. And being Interrogat upon the Indictment, *Depones*, That at *Callicoiloan* upon the Coast of *Malabar* the Deponent did come Aboard the Sloop belonging to Captain *Green's* Ship called the *Worcester*, at which time the Deponent did enter to the Service of Mr. *Loveday* Purser of the said Ship, and the Deponent cannot be positive of the time of his coming Aboard, but believes it was about two Years and a half since, and went in the said Sloop from *Callicoiloan* to *Keilon*, from thence to *Cocheene*, and from *Cocheene* to *Callecut*, and from that to *Tillicherry*; And *Depones*, that upon the Coast of *Malabar* thereafter he did see an Ingagement betwixt the said Sloop, the Ship the *Worcester*, and another Ship sailed by white Men, speaking *English*, and the said Ship did bear *English* Collours. And being Interrogat by the Pannels, what were the Collours the said Ship did bear, *Depones*, that they were of White, Red and Black like to these that the said Captain *Green's* Ship did bear; And that first the said Captain *Green*, the Merchant, and Mr. *Loveday* went Aboard the said Strangers Ship, and stayed for about the space of a Glass, and then returned Aboard the *Worcester*, and then did Man the Sloop of the said Ship the *Worcester* with about twenty Men, whereof were Captain *Green* himself, Mr. *Loveday*, and the Supercargo, the Carpenter and Gunner, and that the Gunners Name was *James Simpson*, whom the Deponent knows and points to at the Bar; And that there were four Guns and two Patteraroes Aboard the said Sloop, and thereafter Captain *Madder* came Aboard of the Sloop, and that they did Ingage the said other Ship for the first and second days, and upon the third day the said Ship was Boarded by those in the Sloop, who when they came Aboard, did take up those of the Crew of the said Ship from under Deck, Killed them with Hatchetts, and threw them over Board: And that Captain *Green*, Captain *Madder*, and *James Simpson* the Gunner were three of these who went Aboard and Killed the Men. And *Depones*, that the Ship the *Worcester* came up during the said Ingagement, and did Fire at the said Ship, but these in the *Worcester* did not Board her: And the Deponent believes that the Men who were Killed and thrown over Board as said is were about Ten in Number; and *Depones*, that there were but few Goods Aboard the said taken Ship, which were carried Aboard the *Worcester*, and amongst the rest he minds of some *China* Root, and *Depones*, that the said Ship which was taken, was Sailed by some of the Crew of the *Worcester*, and carried to *Callicoiloan*, and there Sold, and that the said Ship was not tyed with a Tow to the Ship *Worcester*: And the Deponent

knows not what Men were Killed Aboard the Sloop or *Worcester*, or if any were Killed, but the Deponent himself was Wounded in the Arm, and which Wound he now shows to the view of all. *Depones*, that Captain *Madder* told the Deponent, that if ever he did tell any Person, either white or black of the said Ingagement, that he the said Captain would Kill the Deponent, and heave him over Board. *Depones*, that the Upper-coat which the Deponent presently Wears was found Aboard of the said taken Ship, and which the Deponent has kept since that time. *Depones*, that during the said Ingagement, *Haines*, *Bannantyne*, *Bruckly*, *Wilcocks*, *Burn*, *Robertson*, *Glen*, and *Taylor*, eight of the Pannels were Aboard the Ship the *Worcester*, and that *Keigle*, *Kitchen*, and *Linstead* were Aboard the Sloop with Captain *Green*, *Madder* and *Simpson*; and believes that *Reynolds* was then ashore at *Callicoiloan*; and *Depones* that the said Ship was Sold to a King in *Malabar*, and that the Man who Bought the said Ship bears a *Malabar* Name, whose Servant is called *Coge Commodo*; And *Depones*, that the said Ingagement hapned between *Tillicherry* and *Callecut*, upon the Coast of *Malabar*. And *Depones*, That he cannot positively tell how many Guns the taken Ship did bear, but thinks they were about twenty, small and great. And the Deponent believes that the Ingagement hapned about a Moneth after the Deponent went Aboard of Captain *Green's* Sloop, and cannot be positive when the Ship the *Worcester* did Ingage the said taken Ship, whether first, second, or third day. *Depones*, that the Ingagement was by way of a running Fight. *Depones*, that he knows not who did Sail in the said taken Ship to *Callicoiloan*. *Causa Scientia*, the Deponent was Aboard the said Sloop during the time of the said Ingagement, and saw and heard as he has deponed; and this is the Truth as he shall answer to GOD. *Depones*, he can Write after the *Malabar* Character: And this Deposition is also signed by the said Captain *George Teaman*, the Sworn Interpreter.

Antonio Ferdinando.

Geo. Teaman.

ROT. FORBES.

Compeared *Charles May* Chyrurgeon of the Ship the *Worcester*, Comman-
ded by Captain *Green*, Aged twenty six Years or thereby, Unmarried,
who being solemnly Sworn, purged of partial Counsel, Examined and
Interrogat upon the Libel, *Depones*, That he was Aboard of Captain *Green's*
Ship the *Worcester*, and went from *England* with her, That when the said Ship
went to the Coast of *Malabar*, the Deponent was set ashore at the *Ibeck* which
is the Landing Place, and from thence went up some Miles to *Callicoiloan*;
and sometime thereafter about a Fourthnight, the Deponent did hear the
Fireing of Guns as at Sea, and did meet with *Coge Commodo*, who was Merchant
to the said Ship, and Bought some things from them, with *Franciso de Olivera*
the Linguister of the said Ship, who had come that day from the *Ibeck*, and
that the Deponent asked him what meant the Shooting, and that the said
Coge Commodo and *Francisco de Olivera* answered the Deponent, That the *Worce-*
ster had gone out and was Fighting at Sea with another Ship. And *Depones*, That
the next Morning the Deponent came to the Shore where he did see the Ship
the *Worcester* riding in her Birth, that is much about the same place where
she had lyen before, and that the said place was about four Miles from the
Shore. *Depones*, That there was then another Vessel riding with the *Worcester*
at her Stern. *Depones*, That about some time thereafter, in the same Morning,
the Deponent did see the Long Boat of the *Worcester* coming to the Shore in a
great haste, and that when the Boat Landed, the Deponent asked the Men
what

what was the matter that brought them ashore, it not being ordinar for Boats to come over the Bar, by reason of a great Sea; And the Men answered, That Captain *Madder* had sent them ashore for a *Pinguetta* (which is the Name of a certain kind of Boat) with Water, because they had spilt and staved all their Water Aboard, and that they had been Busking all Night, which the Deponent understood, meant that they had been at sore Labour, and Fatigue, as if their Ship had been driven from her Anchor, and bearing up again. *Depones*, That he did not speak at that time with the Men in relation to any Fight, but that the said Men told him they had brought a Ship in with them, and that the Deponent made no stay at the Shore, but returned immediatly to *Callicoiloan* where his Patients were. *Depones*, That five or six days thereafter, the Deponent went Aboard the *Worcester* for some Medicines which he wanted for the use of his Patients, and that when he came Aboard, the Deponent saw the Deck of the *Worcester* Lumbered with Goods, and five or six Chests also, and some Balls of Goods: And that the Deponent did then say to Mr. *Madder*, Seignior, What have you got there, you are full of Business: And that Mr. *Madder* did then Curse him, and bid him go mind his Plaister Box. And *Depones*, That the Deponent was afterwards informed that the Ship which was riding at Stern of the *Worcester*, was Sold to *Coge Commodo* the Ships Merchant at *Keilon* River, and the said Ship was brought there by a part of the *Worcesters* Crew, who immediately left her, so soon as they had brought her to an Anchor, or otherways fixed her. *Depones*, That the Linguister likeways told the Deponent, That *Coge Commodo* complained he had bought the Ship too Dear, and that he said he had bought one the Year before Cheaper, tho four times the Value. *Depones*, That some time thereafter the Sloop came down the Coast, and that *Antonio Ferdinando* was sent ashore to the Deponent at the *Ibeck*, and that the said *Antonio Ferdinando* the *Black* was Wounded in the Arm, and that the Deponent did take off the dressing of the said Wound, and found it to be a Fracture, and that it lookt as if the Wound had been occasioned by a Gun Shot, and that the Deponent asked the said *Antonio Ferdinando* the *Black*, who had dressed the Wound, or set his Arm, and that the said *Black* did tell the Deponent, that he was set ashore at *Coccheene*, and there dressed by a Dutch Chyrurgeon. And *Depones*, That sometime thereafter, he went Aboard the *Worcester*, and called for the said *Black*, and any other Persons that were Ill, and there came to him to his Chest, *Duncan Mackay*, and another which the Deponent thinks was *Edward Cumming*, but cannot be positive, and that these Persons were also Wounded, and that the said *Black* was likewise there. And *Depones*, That he did ask his said Patients how they came by their Wounds, and that Mr. *Madder* hearing the Deponent ask Questions, he came to the Deponent, and bid him ask no Questions, and likeways discharged the Patients to answer the Deponent any Questions upon their Peril: And the Deponent then said to Mr. *Madder* that he had no Command over him, and that Mr. *Madder* answered that he would go to one who had Command over the Deponent; And that the said *Madder* went up accordingly, and thereafter returned and ordered the Deponent immediatly ashore, and the Deponent was accordingly carried ashore in the *Pinguetta* that was lying by the Ships side. *Depones*, that all this which the deponent has before deponed upon, did fall out about the Months of *January* or *February* 1703 Years. *Depones*, that while the Ship the *Worcester* was going up the Coast of *Malabar*, Mr. *Linstead* one of the Crew was left at *Keilon*, which was near seven Leagues, or about twenty one Miles from *Callicoiloan*, and that the said *Linstead* was left there with one Mr. *Hammond*, to take care of some part of the Cargo which was to be put aboard of the Ship. *Depones*, that he did not see the said Mr. *Linstead* at *Keilon*, but only heard that he was left there, and

remained there as the Deponent heard till the Ship came back. And *depones*, that the shooting which the Deponent heard was before the Ship came back, as he has already deposed; And *depones*, that thereafter during the Voyage he never heard the Crew, or any of them talk of their taking a Ship: *Depones*, that whilst the Deponent heard the said shooting, Mr. Loveday and Mr. Otlay were ashore at Callicoiloan; and *Depones*, that when the Worcester sailed from England, the Crew was about 35 or 36 in Number. *Depones*, that while the Deponent was aboard, the Ship went no further up than Calicut; and *depones* that the Reason how he knows Mr. Hammond and Mr. Linsteed were ashore at Keilon was, that he heard the Supercargo desire the said persons to go ashore and take care of some part of the Cargo: and *depones*, that he was but two or three Hours aboard after he heard the Supercargo give the said Order, and saw not the said two persons Hammond and Linsteed go ashore. And *depones* that it was in the Ship the Worcester's going up the Coast of Malabar that the Deponent heard the shooting. *Depones*, that upon that Coast the Ship sprung a Lake, & did from thence sail to Bengal, in order to have the same helped; And *depones* that he knows not how many Leagues there was betwixt the place where the Lake sprung & Bengal, but that it was about 5 Weeks sailing: *Depones*, that he knows not the Reason why the Ship was not brought in to some place on the Coast of Malabar for being re-fitted; *Depones*, that when the Deponent came aboard from Callicoiloan, and that the Ship weighed Anchor, and sailed to Cocheene, and from that to Calicut, and thereafter came back the same way: *Depones*, that there were some Goods put aboard the Ship from Calicut, but none at Cocheene as the Deponent remembers. And further *depones*, that when the Deponent returned, he found Mr. Hammond and Mr. Linsteed ashore at Keilon. *Causa scientie patet*: And this is the Truth as he shall answer to GOD.

Charles May.
ROBERT FORBES.

Compeared Antonio Francisco Servant to Captain Thomas Green Commander of the Ship the Worcester, aged 22 Years or thereby, unmarried; with Captain George Yeaman Merchant in Dundee his Interpreter, and the said Antonio Francisco being solemnly Sworn, purged of partial Counsel, Examined and interrogat upon the Libel pursued by the Procurator-fiscal against the said Captain Green, and the other Pannels, *Depones*, That the Deponent believes there is a GOD, and his Mistress at Pegu caused Baptize him a Christian, and he owns the Christian Religion, and he came to the Service of Captain Green at Delagoa. *Depones*, That upon the Coast of Malabar, while the Deponent was aboard of the Worcester, he heard some shooting of Guns from aboard the Worcester, to the Number of six or thereby, and that the Deponent in the mean time was chained and nailed to the Floor of the Fore-Castle in the said Ship, and he heard no shooting from any other Ship. *Depones*, that two days after the Deponent heard the said shooting, he saw some Goods brought aboard the said Ship the Worcester, and which Antonio Ferdinando the other Black told the Deponent, were brought from another Ship which they had taken; And likewise the said Black told the Deponent, that at the same time Captain Madder had given some Rack, *id est* Brandy to the Men, and at the same time, the other Black told the Deponent likewise, that there were Ten men of the Crew of the taken Ship killed when she was taken, and that the said Black did let the Deponent see a Plaister on his Arm, upon which he said he had got a Wound by a Shot while in the Sloop taking the other Ship, and that he told the deponent that the said Ship was taken by the Sloop belonging to the Worcester,

cester, and that the Deponent neither heard of, nor did see any other wounded men. *Depones*, that he does not know where they were sailing after he heard the shooting, but he was told by the other *Black*, that they were sailing to *Callicoiloon*, and the said other *Black* did forbid the Deponent to tell any person whatsoever of the said Engagement; and the Deponent does not remember how long it is since he heard the said shooting of Guns: And *depones*, that *Antonio Ferdinando* the other *Black* told the Deponent all these Matters upon the Coast of *Malabar*, and that the said *Antonio* came aboard the Ship the *Worcester* when they were going to *Bengal*. And *depones*, that while he was chained to the Fore-castle he knows not who were aboard, or who were ashore, and that he was so chained for the space of two Months, and that he was so chained to the Fore-castle about ten days before he heard the said shooting; *Causa scientia patet: Depones* he cannot write, This Oath signed by the said Captain *George Teaman* the Deponents Interpreter.

George Teaman.

ROBERT FORBES.

Compeared *James Wilkie Taylor Burges* of *Edinburgh*, aged twenty five Years or thereby, Married, who being solemnly sworn, purged of partial Counsel, Examined and Interrogat upon the Libel pursued by the Procurator-fiscal against Captain *Green* and the other Pannels, *Depones*, That in *October* last, after Captain *Green's* Ship was brought into *Bruntisland*, the Deponent went over to *Bruntisland* with his Mother, with a design to learn of some News, or to get some notice of a Brother of his, *Andrew Wilkie*, who had gone alongst with Captain *Drummond* to the *East-Indies*, *Depones*, that after the Deponent and his Mother came to *Bruntisland*, they went to Mrs. *Seton's* House, where the deponent fell in company with *George Haines*, whom the deponent presently points in the Pannel, and after some discourse, the deponent asked the said *George Haines*, whether or not in his Voyage he had not seen Captain *Drummond*? At which the said *Haines* fell in a Passion, and said, *Damn me, what have I to do with Captain Drummond.* *Depones*, that the Deponent seeing *Haines* in such a bad Humour, forbore for some time to speak about his Brother or Captain *Drummond*, but after that they had taken some Cups about, and that the Deponent thought *Haines* in a better Mood, the Deponent asked the said *Haines*, if he had not heard of, or seen any Scots Ship coming to or from the *East-Indies*; *Depones*, That *Haines* then said, that while their Ship was upon the Coast of *Malabar* (where they had taken in a *Black*, whom *Haines* pointed to, and had by him at the time) a Dutch Ship informed them, that one Captain *Drummond*, commanding a Scots Ship was turned Pirat, and that thereupon they manned their Sloop, and made themselves ready, in case they should have been attack'd. But *Haines* added, that they did not see the said Captain *Drummond*. *Depones*, that the said *Haines* did likewise say, That he had in his Custody at the time the Ship the *Worcester* was seized in the Road of *Leith*, that which he would not have fallen in the Seizers Hands for twice the value of the Ship. And *depones*, that the said *Haines* likewise added, that he threw it over-board after the Ship was seized, saying, Let them seek it now in the Bottom of the Sea. *Depones*, that while the Deponent was discoursing with the said *Haines* about the worth of the Ship, the said *Haines* said to the Deponent, that it would not be found to be so rich as it was expected, but that there was still in the Ship that which would never be found by the Seizers, unless they pulled her Board from Board, and that the said *Haines* said he knew very well where that thing lay. *Depones*, that his Mother, having gone to the other Room to Mrs. *Seton* the Mrs. of the House, desired the said Mrs. *Seton* to inquire of *Haines* concerning her Son the deponents Brother,

and that Mrs. Seton said, that Haines was a Suiter of Anne Seton her Daughter, who would be more proper to inquire that of Haines, and that the next Morning Anne Seton declared in presence of Kenneth Mackenzie, that Haines had said to her, *he found they had a design to pump him, but that they should not be the wiser of him, tho what he had said, he had said, but would say no more at that time. Causa scientia patet.* And this is the Truth as he shall answer to God.

James Wilkie.

ROBERT FORBES.

Compeared Kenneth Mackenzie Indweller in Cannongate, aged twenty seven Years, or thereby, Married, who being solemnly Sworn, purged of partial Counsel, examined and interrogat *ut supra*, Depones, that in the Month of October last, when the Ship the Worcester was lying in Bruntisland Harbour, the Deponent was in Widow Setons House with George Haines, (whom he now points to in the Pannel) and James Wilkie, and heard the said James Wilkie ask the said Haines about Captain Thomas Drummond's Ship, at which the said Haines fell in a Passion, but the Deponent going out of the Room, heard no more what past; And depones, that the same Night, the Deponent heard Mrs. Wilkie intreat the said Widow Seton to endeavour to get an Account, from any of Captain Green's Crew, of her Son, who had gone Doctor aboard of the said Captain Drummonds Ship; and having returned next morning, the deponent heard Anne Seton Daughter to the said Widow Seton tell, that Haines had said to her, that they had a design to Pump him, but what he had said, he had said; and that he the said Haines told the said Anne Seton when askt by her, why he fell in a Passion at the mentioning of Captain Drummond, that he answered, that he knew more of the said Captain Drummond than he would tell. *Causa scientia patet.* And this is the Truth as he shall answer to GOD.

Kenneth Mackenzie.

ROBERT FORBES.

Compeared William Wood one of the Gunners of Her Majesties Artillery, aged Fifty three Years or thereby, Married, who being solemnly Sworn, purged of partial Counsel, Examined and Interrogat *ut supra*, Depones, that the Deponent was in Company with George Haines at Bruntisland, and that one John Henderson Writer in Edinburgh was likewise present: Depones, that the said George Haines and the rest in Company with the Deponent, having drunk pretty warmly, the said George Haines fell in a melancholy Fitt, and John Henderson having asked the Reason, the said Haines exprest himself thus. *It is a wonder that since we did not sink at Sea, that God does not make the Ground open and swallow us up when we are come ashore, for the Wickedness that has been committed during this last Voyage on board of that old Bitch Befs, pointing to Captain Green's Ship; And Depones, that thereafter he went a walking with the said George Haines in the Links of Bruntisland, and the Deponent happening to tell the said Haines, that Captain Madders Uncle was burnt in Oyl for attempting to burn the Dutch Ships at Amsterdam; the said George Haines did thereupon tell the Deponent, That if what Captain Madder had done during this last Voyage were as well known, he deserved as much as his Uncle had met with. Causa scientia patet.* And this is the Truth as he shall answer to God.

William Wood.

ROBERT FORBES.

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Compeared *John Henderson* Writer in *Edinburgh*, aged twenty Years or thereby, unmarried, who being solemnly Sworn, purged of partial Counsel, Examined and Interrogat *ut supra*, *Depones conformis precedenti*, viz. *William Wood*, in omnibus, except as to what happened betwixt the said *William Wood* and *George Haines* in the Links of *Bruntisland*, in relation to Captain *Madder* and his Uncle. *Causa scientie patet*: And this is the Truth as he shall answer to God.

John Henderson.
ROBERT FORBES.

Compeared *Anne Seton* Indweller in *Bruntisland*, aged 19 Years or thereby, unmarried, who being solemnly Sworn, purged of partial Counsel, Examined and Interrogat *ut supra*, *Depones*, that she was present with *George Haines* one of Captain *Green's* Crew, (whom she points at the Barr) in *Bruntisland* at the time when *Mrs. Wilkie* and her Son were there, that *Mrs. Wilkie* desired the Deponent to endeavour to learn if *George Haines* knew any thing of Captain *Drummond*, because the said *Mrs. Wilkie* had a Son that went along with him. *Depones*, that she the Deponent did accordingly inquire at *Haines*, but he denied that ever he saw the said Ship, or knew any thing of her. *Depones*, that she was likewise present with *George Haines*, when *William Wood* one of Her Majesties Artillery, and *John Henderson* were in Company with him, and that at that time, *George Haines* in a melancholy Fitt expressed himself thus: *It's a wonder, that since we did not sink at Sea, that we are not swallowed up with the Ground ashore, for the Sins committed on Board of Captain Green's Ship.* And *depones*, that he likewise added, during the last Voyage; And *depones*, that *Haines* said to the Deponent, *That he knew more of Captain Drummond than what he would express at that time.* *Depones*, that the said *George Haines* told the Deponent, *that when the Ship was seized in Leith Road, he had aboard with him that which he would not have had to fall in the Seizers Hands for twice the value of the Ship, but that he threw the same over-board.* *Depones*, that she never talked with *Haines* about an old Sweet-heart that she had aboard of Captain *Drummond's* Ship, nor did the said *Haines* say to the Deponent, *that she would never see him again.* And *depones*, that she never heard *Haines* say, *that there was yet aboard of the said Ship what would not be found unless she were pulled Board from Board.* And *depones*, that when the Deponent was inquiring of *Haines* about *Mrs. Wilkie's* Son, that he said, *that she designed to Pump him as Mr. Mackenzie had done before.* *Causa scientie patet.* And this is the Truth as she shall answer to God.

Ann Seton.
ROBERT FORBES.

Compeared Captain *John Brown* Skipper in *Leith*, aged 40 Years or thereby, married, who being solemnly Sworn, purged of partial Counsel, Examined and Interrogat *ut supra*, *Depones*, That he went aboard the Ship the *Worcester* when the Goods were unloaded, by Order of the Lords of the Committee of Privy Council, and saw the Hatches which were fast and sealed, opened. *Depones*, that on the Larboard-side of the Ship the Goods were much damaged, and that few or none of the packt Goods were Numbered or Marked, which is customary, and the deponent himself never received any Goods but what were Marked, that he might know to whom they belonged. *Depones*, that the Goods aboard the said Ship were regularly enough stowed. And being interrogat for the Pannels, whether or not it be customary that Goods be Marked or Numbered where there is a *Supercargo* aboard. *Depones*, that it is always customary, whether they belong to Ten, or one Man. And

being interrogat for the Pannels, vvwhether or not the Reason vvwhy the Goods vvanted Mark or Number might be, because that the Goods vvvere much damaged, and the Pepper spoilt and heated. *Depones*, that vvwhere the Goods or Pepper vvvas spoiled, the Balls vvvere all rotten to pieces, but vvwhere the Pepper and other Goods vvvere intire, there vvvere Balls and Packs vvwhich vvanted both Numbers and Marks: And being likewise interrogat by the Pannels, vvwhether or not there vvvere some Packs and Balls that had a common Ship Mark, and some vvwho had only the Vestige thereof, being near vvorn out. *Depones*, that there vvvere a great many vvwho had a common Mark, and that it vvvas plain and obvious, and that there vvvere others vvwho had no Mark at all, and that the most part vvanted Marks altogether, and that there vvvere tvvo or three Balls vvwho had the Vestige of a Mark. *Causa scientia*: The Deponent Witnessed the unloading of the said Ship, at the desire of the Lords of the Committee of Privy Council, and saw and knows as he has deponed. And this is the Truth as he shall answer to God.

Jo. Brown.

ROBERT FORBES.

COmpeared Archibald Hodge Skipper in *Leith*, aged 40 Years or thereby, married; who being solemnly Sworn, purged of partial Counsel, Examined and Interrogat *ut supra*, *Depones*, that he was aboard of the Ship the *Worcester* in *Bruntisland* Harbour when the Committee of Privy Council came to Rummadge her, and saw Goods unloaded from aboard. *Depones*, that the most part of the Goods vvanted both Number and Marks, which is noways common or regular in any Ship that ever the Deponent has seen; But the Deponent did never see any *East-India* Ship unloaded before. *Causa scientia patet*. And this is the Truth as he shall answer to GOD.

Archibald Hodge.

ROBERT FORBES.

COmpeared John Glen Goldsmith, Indweller in *Leith*, aged 43 Years or thereby, married, who being solemnly Sworn, purged of partial Counsel, Examined and Interrogat *ut supra*, *Depones*, That the second day after the Ship the *Worcester* came to *Leith* Road in Summer last, the Deponent went aboard the said Ship, and about Twelve a Clock of the day, the Deponent was in the Cabine with Captain Madder and one Hammond, now in *England*, as the Deponent is informed; At which time the said Captain John Madder took a Seal out of his Pocket, and asked the Deponent what he thought of the *Scots African* and *Indian* Companies Arms, and at the same time gave the Deponent the said Seal in his Hand, to which the Deponent did look, and found thereon the *St. Andrews Cross*, a Dromedarie or Camel with a Castle on the back of it, and a Ship with a Rising-Sun above the Helmet, and two wild Men as Supporters, and that the said Seal to the best of the Deponents Memory, was near the bigness of an *English* Half-Crown, and had an Handle of *Lignum-vite*. And being interrogat if aboard the said Ship he did see the Impression of the said Seal upon any Paper, *Depones negative*. And further *Depones*, that the Seal now exhibited in Court was not the same which Captain Madder did shew to the Deponent; and whereupon he has deponed as above. *Causa scientia patet*: And this is the Truth as he shall Answer to God.

John Glen.

ROBERT FORBES.

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The Probation being ended as above, and the Assize ordained to encluse; some of the Assizers moved, That that part of the Judges and Assessors Interloquitor, whereby they find the Crimes of Piracy, or Robbery, or Murder as Libelled, being proven by clear and plain Evidence relevant, &c. to be explained as to these Words, *being proven by clear and plain Evidence*, if the same did require, that the said Crimes of Piracy, or Robbery, or Murder should be proven by two or three Witnesses, directly proving the foresaid Crimes; Or, if it were only required, that the Crimes of Piracy, or Robbery, or Murder as Libelled, being proven by a clear and plain Evidence, as to the Cumulative and concurring Presumptions, whereby the same were alleged to be inferred, although two concurring Witnesses should not be found as to every several Presumption, were sufficient. The said Judge and Assessors declared their meaning to be in the Terms of Law, *viz.* That tho' there were not a direct Probation of the Crimes Libelled, *per idoneos testes, vel instructa apertissimis documentis*, yet if the Crimes did appear by the Qualifications and Circumstances as they were Libelled, to be made out *per Indicia ad probationem indubitata & Luce Clariora*, albeit every Circumstance and Qualification were not proven by two direct Witnesses, the same should be held for a clear and plain Evidence.

Thereafter, according to the custom observed in Criminal Courts and Processes, that the Advocats for the Pursuer, and for the Pannels are allowed *hinc inde* to speech the Assize, and resume and lay before the Assizers the Libel, with the Interloquitor past thereon, and apply the Probation led for proving thereof on the one part, and on the other to resume the Defences for the Pannels, and to take off as much as possible the weight of the Probation for their Defence and Exculpation; Sir David Dalrymple Her Majesties Solicitor, one of the Assistants to the Procurator Fiscal in this Criminal Pursuit, spoke to the Assize in manner following.

Gentlemen of the INQUEST,

YOU have before you Indictments against the Pannels upon very atrocious Crimes, and these Indictments have been sustained relevant as Libelled, by the Honourable Judges Admiral, to be proven by clear and plain Evidence: But for your further satisfaction, at the desire of some of your own Number, made openly in Court, The Judges have declared, That by these Words, *Plain and clear Evidence*, They do not confine the Assize to two concurring Witnesses, but have left to you what Evidence is necessary to make Faith according to the nature of the Crime, to your Conviction.

Your business then, *Gentlemen*, is to apply or compare the Probation with the Indictment, and to return your Verdict distinct, concerning what you think proven or not.

It is a happiness that this Trust is in the hands of Persons so Discerning and Faithful, and therefore the less needs to be said, either for clearing the nature of the Crime, the manner of the Discovery, or for summing up the Evidences; But to comply with the custom of such Tryals in this Kingdom, and for preventing the mistakes into which the Lawyers on the other part seem to lead you, Forgive me, if after a Sederunt of Twelve Hours, spent in leading of the Probation, I detain you a little longer, in Recapitulating what has past, with some few Observations, I hope, not improper before ye encluse.

As to the Crimes contained in the Indictment, it is obvious how hainous they are, and how hateful they render the Persons who are truly Guilty in

the Eye of Law, a Pirat is in a perpetual War with every individual and every state, Christian or Infidel. Pirats properly has no Countrey, but by the nature of their Guilt separates themselves, and Renounce on the matter, the benefit of all lawful Societies: They are worse than ravenous Beasts, in as far as their fatal Reason gives them a greater faculty and skill to do Evil; And whereas such Creatures follow the Bent of their Natures, and that promiscuously, Pirats extinguish Humanity in themselves, and prey upon Men only, especially upon Traders, vvho are the most Innocent. The Crime of Piracy is Complex, and is made up of Oppression, Robbery and Murder committed in places far Remote and Solitary. And indeed if GOD had not in a most Wonderful way brought the Crimes whereof these Pannels stand Accused to Light, they might have escapt unpunish'd in this World, to their own eternal Destruction, and to the great loss of such who may be amended, or prevented by the Example of their Punishment. But altho the Abuses now complained of, happened in the vast Ocean, and at no less distance than the *East-Indies*, and that the Actors were tyed by obvious Reason to Secrecy on their own account, and were bound by a regulous Command not to reveal or answer Questions; And besides all these, it is most probable there was a most impious Oath interposed, as uses to be in such cases, and which has more force to restrain Men of such desperat principles and practices, than all the ties of Religion or Nature: Yet GOD in His Providence has let in Light upon these dark and cruel Crimes, as it were by meer accident. For I presume, you are not Ignorant, that the first notices of this matter proceeded from Words which were dropt in passion, or exprest by the weight of Guilt concerning the Wickednesses which have been done Aboard the *Worcester* during the last Voyage. These, and some other grounds of suspicion which appeared upon better inquiry, were the occasion of the Information given to the Government, and how cautious the Lords of Her Majesties most Honourable Privy Council have been in Examining the matter before any prosecution was appointed, I perswade my self that you and the whole Nation know and are satisfied. And now that the Probation has been solemnly led in presence of this Court, and of the great number of all Qualities who have been present, I doubt not, it will appear to you and all Men who will suffer their Reason to act freely, That these Informations have been but too well founded.

The Indictment as it concerns the facts Libelled, consists chiefly of two parts. The first concerns a Murder and Piracy happening upon the Coast of *Malabar*. The second concerns Circumstances which help to give Light to that Piracy, and which circumstances have happened since the Arriving of the *Worcester* into this Countrey.

As to the first, *Gentlemen*, You have the Testimony of the first Witness *Antonio Ferdinando*, who Depones, *He came Aboard of the Worcester upon the Coast of Malabar, and that about a Moneth after, he saw an Engagement betwixt the Sloop belonging to the Worcester, and another Ship Sailed by White Men, speaking English, and bearing such Colours as Captain Green's Ship did bear, and that the Captain and some others of the Worcesters Crew went Aboard the Strangers Ship, and stayed about the space of a Glass; That upon their return to the Worcester, the Sloop was man'd out with twenty Men, of which number were the Captain himself, with Maddar, Simpson, Keigle, Kitchen and others. That the Sloop was mounted with 4 Guns and 2 Pateraroes. That the Sloop Engaged the Strangers Ship, and that there was a running Fight for 3 Days, during which time the Worcester came up and Fired at the said Ship, and that upon the third Day the said unfortunat Ship was taken, (and what is fearful even to repeat) The Crew being about Ten, were Murdered and thrown over Board. That the Goods were brought Aboard of the Worcester, and the taken Ship was sailed with a part of the*
Worcesters

Worcesters Crew to Callicoiloan, and there Sold to Coge Commodo ; That the Deporent himself was Wounded, the scar of which Wound was shown to you, Gentlemen, and the Court; and that he was Commanded to keep secrecy under the highest peril, and that the very Upper-coat which he wears (and in my Judgment appears to be Scots Rugg) was a part of the spoil.

As to this Testimony, Gentlemen, There are several things very observable, such as the stayedness, simplicity and constancy of this Witness, who in many Examinations before the Council, and Committee of Council, has uniformly given the same account which he has now Deponed before this Honourable Court; Not in the same form of conceived Words, but materially the same, tho the Interrogators have been changed : And I think it adds to the weight of his Testimony, that ye are Witnesses how it was emitted, while he was under heavy Sickness, and forced to lie down at the end of the Table.

2. It is observable, that this Witness *Antonio Ferdinando* had no accession to the discovering of this matter, nor was at all an Informer ; But the matter being inquired into, he did plainly and honestly acknowledge from the beginning, as he has now Deponed ; Neither was the story first told at *Leith*, nor since the Pannels arriving in our Harbours, but it appears by the Testimony of *Antonio Francisco* the other *Black*, (who shows a great Inclination to favour Captain *Green* and the Pannels) that *Ferdinando* gave him the same account in substance upon the Coast of *Malabar* ; and this is farther confirmed by *Stringman* the Cook, who told in several Examinations before the Council, That shortly after the said *Stringman* came Aboard on the Coast of *Bengall*, *Ferdinando* who was his Mate, gave him the like account of the Story. So that it is morally evident, that this account of the Crime was not invented with any view of a Tryal against the Captain and Crew.

3. It is worthy your notice, that Captain *Green* had been Aboard of the unfortunat Ship taken, as a Friend, and had opportunity to spy that the Crew, being but about Ten, were too weak to Man or Defend a Ship of 20 Guns, which, no doubt, emboldened him to undertake the Wickedness complained of.

It is observable, That the several parts of *Ferdinando's* Testimony are fortified by concurring proofs. As first, by the Books found Aboard, it appears that the Sloop was furnished with Arms in the Month of *February* Libelled, and that the Arms were such as the Testimony mentions. 2. He shows you the scar of his Wound upon his Arm, and as he Depones that he got it in the Engagement, so the Chyrurgeon Depones, That he not only saw it, but that shortly after the hearing of the Shooting, he had taken the dressing from off the Wound, and found it a Fracture, and that it lookt like a Gun-shot, and that the *Black* came to his Chest a few days thereafter to have it dressed Aboard. 3. The Testimony of *Ferdinando* is also confirmed by the Depositions of *Francisco* and Mr. *May*, as to two very notable Articles, viz. The bringing of the Goods Aboard about that time. And by the Testimony of the said Mr. *May*, as to the Ship taken riding at the Stern of the *Worcester*. 4. Captain *Madders* severe Commands for observing of secrecy, is not only Deponed upon by *Ferdinando* the first Witness, but also by *May* the Chyrurgeon very circumstantially, when Mr. *May* asked an innocent Question, as one should think, upon seeing the Deck Lumbered with Goods, Mr. *Madder* answers, Cursing him, and bids him mind his Plaister Box : When *May* goes to his Chest, there came three Men to be dressed of their Wounds, of which the *Black* was one. *May* asks them how they came to be Wounded, but *Madder* had followed, and commands silence on their Peril ; But Mr. *May* persisting in his inquiry, *Madder* goes to the Commander and brings a positive Order to answer no Questions: Thus *Ferdinando* and

May concur as to the command of silence. Now, I put it to your Consciences, *Gentlemen*, if ye think this mystery was used to cover a common accident; or if rather you are not satisfied; that joyning the Testimony of *Ferdinando* with the Wounds, and the silence so rigorously imposed, the Goods brought Aboard, the riding of the taken Ship at the Stern of the *Worcester*, they do not evince the certainty of the Piracy and Murder libelled as far as the nature of the thing can admit.

To these, *Gentlemen*, Ye would be pleased to joyn in your Observation, that it is owned and demonstrated from the Books taken Aboard of the *Worcester*, that there sprung a Leak in the said Ship on the Coast of *Malabar*, and that it had been most natural for the Pannels to have carried their Ship to *Goa* or to *Surrat*, which was within ten Degrees Sailing or thereabouts, yet the Pannels did choise rather than continue on that Coast, to run along in a leaky Vessel, a dangerous Course, round the *Peninsula* and the Island *Keilon*, to the Bottom of the Bay of *Bengall*, a Course of about 7 or 800 Leagues. But that Fatigue and Risque was small, when compared with the danger of repairing their Ship on a Coast, where their Crimes might be more easily discovered. 2. It is remarkable that the Books found Aboard, and now lying before you, contain the full Instructions given to Captain *Green* and his Company from their alledged Owners, which have something mysterious from the very beginning: I have had little occasions to peruse them, having seen them this Morning for the first time, but one thing I could not but notice, that in the Instructions, one Article contains a Cypher, in which the Captain or Supercargo was to Correspond with their Owners; and altho this Cypher seems to be nice, and well enough devised at first to cover the Correspondence from any ordinary Curiosity, yet so great anxiety has been shown concerning this Cypher, that the Freighters send a Letter after the Ship, adding an Instruction, that besides the Character to be used, there should be this further disguise added, that the middle Letter of the preceeding Word should be always repeated before the first Letter of the next Word, of which for illustration, the Letter contains an Example, giving Direction how Letters should be Addressed to the Writer himself. But neither was this caution sufficient, for next day another Letter is Written, relating still to the Cypher, and wherein the Writer expressly advises, that the Letters from the Ship should not be Directed to himself, but to a Scrivener living in *Street London*, and that they should not be Subscribed: Why all this mystery? The Correspondence must be in Cypher, and this Cypher exquisite and defined: And yet the Letters to be addressed to a 3^d Person obscure, for what I know; they were not to contain any Address or Subscription which should either discover the Writer or the person to whom he Writes: Fair Trading requires no such affectation. But further, you will be pleased to notice, that the outward Cargo for a Ship of 200 Tuns and 20 Guns mounted, Sailed with 36 Men, was in value but 999 *Lib. 17. sh. 2. d. sterl.* which appears by the Document produced by themselves for Instructing their Entry at the Custom House, and that too for the most part Arms: I have not so much Experience in matters of Trade, but to me it seems very strange that a Voyage so exceedingly Hazardous and Expensive should have been undertaken with so small means: And these things in the very undertaking of the Voyage being joyned with the shrewd evidences of the Crimes, whereof these Pannels stand accused, seem to be of very great weight; and where such Fineness occurs in the Entry, and the Effects are so Tragical in such an Inquiry, I hope I shall be forgiven by every Body, having laid them before you with as much tenderness to the Freighters (with whom I have nothing to do) as possible.

As to the second part of the Libel, I mean these Circumstances which concur to give Light to the Crimes chiefly libelled; there is also sufficient Evidence,

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The first of these Circumstances is, what concerns Mr. Reynolds one of the Pannels: The Indictment bears, that there was a Letter found writ to him by his Wifes Sister, in return to one of his writ to his Wife, wherein his said Sister advises him to confess, adding, that in his own Letter which she had seen, he says, *That some of their Men had basely confessed*; which implied that they were guilty: And Reynolds being questioned upon this Letter, produced the Copy of his Letter to his Wife, which occasioned his Sisters writing to him, agreeing with this Letter: These you have before you.

I am not ignorant that *Ferdinando* the first Witnes says, *he believes Reynolds was ashore*, but the Testimony as to that is not positive; Neither is it in my Judgement sufficient to take off the Accession to the Crime, or Art and Part libelled, since the said Reynolds was of the same Crew, and did not separate himself from them; and, it is most presumable, had his own share of the Booty: Besides, it's plain from the Letters, he was conscious to the Truth, which he says *was basely confest*; and it is of little Weight what has been offered as a Glofs, *viz. basely confessed*, is as much as if he had said *falsely told Stories*. For in the ordinary way of speaking, to Confess, is to tell true, and the Adverb *basely* implies no more, than if he had said that they had ungenerously confessed, tho it be indeed rather a Duty whatever Mr. Reynolds thinks.

The next observable Circumstance is, what concerns George Haines; as to whom, by laying together the Testimonies of James Wilkie, Kenneth Mackenzie, William Wood, John Henderson and Anne Seton, you will find it proven, that upon asking a Question about Drummonds Ship, Haines fell in a Passion, by the Depositions of Wilkie and Kenneth Mackenzie. 2. That Haines said, that *when the Ship the Worcester was seized in the Road of Leith, he had that in his Custody, which he would not have fallen in the Seizers Hands for twice the Value of the Ship, and that he threw it over-board*, is proven by the Testimonies of James Wilkie and Anne Seton. 3. That James Wilkies Mother imployed Anne Seton to enquire of Haines concerning her Son who had gone Doctor to Drummonds Ship, is proven by the Testimonies of Wilkie and Seton, and Kenneth Mackenzie depones, that he was present when the said Anne Seton gave an Account of what had past betwixt her and Haines, and that she told that Haines said, *they had a design to Pump him*, and that being askt why he fell in a Passion at the mentioning of Captain Drummond, he answered, *That he knew more of Captain Drummond than he would tell*; and Anne Seton concurs with Mackenzie as to these Particulars. 4. That Haines in a Melancholy Fitt, burst furth in these or like Words, *It's a wonder that since we did not sink at Sea, God does not open the Earth to swallow us up at Shore, for the Wickedness committed during the last Voyage in that old Bitch Bels* (pointing to Captain Green's Ship, is proven by the concurring Testimonies of William Wood, John Henderson and Anne Seton. And 5. That Haines said, *If what Captain Madder did during the last Voyage, were as well known as what his Uncle undertook at Amsterdam, he deserved as much as his Uncle met with, which was to be boyl'd in Oyl*, is only attested by William Wood; nor does every minute Circumstance need a concurring Probation.

Having thus laid before you the Indictment and Probation, conjoyning these Proofs, which, I am confident, to all impartial Men will appear clear and plain Evidence of the Crimes of which these Pannels are accused; I shall take Liberty in the next place to pre-caution you against certain Insinuations which the Pannels Lawyers have discovered when the Probation was a leading.

I need be at little pains to convince you, that the first Witnes tho a Black, is a legal Witnes, seing that, upon full Debate, has been already determined by the Honourable Judges; And indeed besides that, he is not only a Man but a Christian, and adduced for proving a Crime covered, committed at Sea, which

is more solitary than any Desert at Land: His Testimony had such a distinguishable Air of Truth and Sincerity, as made him not only a legal Witness, but a very material and probative one; But the Pannels Lawyers would fain have observed some Inconsistency in his Testimony, and betwixt it and that of Mr. Mays: For say they, *Ferdinando* depones that he came aboard 2 Years and a half ago, and that the Action happened about a Month after he came aboard, so that it must have been in the Month of November 1702, and not in the Months of February, March, &c. 1703, but ye were Witnesses that the *Black* did not depone positively as to the time of his coming aboard, but said it was about two years and a half ago, and that the Engagement was about a Month after: Both these Designations of the Time admit a Latitude; and he was so cautious, that he stopt again before he signed his Oath, until it was told him that it could not be otherways understood.

But then they urge, that he depones, that the Engagement happened betwixt *Tillicherrie* and *Callecut*, upon the Coast of *Malabar*, yet Mr. May depones, that he heard the Shooting at *Callicoiloan*, which, say they, being at such a vast distance from *Tillicherrie* was impossible.

But these Gentlemen do not observe, that the Engagement continued for three days, and that it is expressly deponed there was a running Fight during that time; So that tho the beginning of the Attacque might have been betwixt *Tillicherrie* and *Callecut*, yet it might have continued along the Coast.

Neither is it of more moment what these Gentlemen observe, that the Stranger Ship attacked might have in three days got off, because it appears she was attacked and pursued by the Sloop which was a light Vessel, and the Ship it self attacked was weakly Man'd, having but about ten Men aboard, and a Ship of 20 Guns.

But it may possibly be further urged, that the *Black* deponed that Mr *Loveday* and *Linsteed* were aboard the Sloop, whereas Mr. May depones that Mr. *Linsteed* was left at *Keilon*, and that he heard him ordered to go ashore before, and saw him taken in to the Ship sometime afterwards.

But neither is there any inconsistency in this Particular betwixt these two Oaths, for Mr May depones, that when the Ship came upon the Coast of *Malabar*, he himself was put ashore, and altho' before he was put ashore, he heard *Linsteed* and *Hammond* ordered ashore, yet he did not see them go; So that *Linsteed* might have continued in the Ship notwithstanding. Or in the next place, let us suppose that *Linsteed* had once gone ashore, does it from thence necessarily follow that he did not come aboard again till the Doctor saw him taken up? Certainly it does not, for Mr. May continued a very long time ashore: But now granting what these Gentlemen so earnestly desire, that *Ferdinando* had been mistaken as to some such Circumstance, can that overturn his Testimony? The thing happening upwards of two Years ago; The Subject was an Engagement at Sea, perhaps the first Fighting ever he was witness to, and the Confusion which for the most part is incident to the firmest Spirits in their first Adventures, might excuse this Witness, if in a minute Circumstance he had mistaken, seing his Oath, as to what is material and essential, is most pregnanty asstruck; as has been already said.

It may be likewise observed, that it was very much urged for the Pannels, that *Ferdinando* came aboard the Ship at *Anjango*, only two days before the Ship parted from the Coast of *Malabar*; But tho that were true, it would be little to the purpose: For it is evident by his own Deposition, that at first he entered to the Service of Mr. *Loveday* the Purser, and that he came aboard of the Sloop at *Callicoiloan* with *Loveday*, and the Sloop was the chief Instrument made use of in the Piracy libelled.

It is not unlikely that the Lawyers on the other side will amuse you with Observes upon Mr. May's Testimony, as that he is but a *Witness de auditu*, not having been present at the Action ; But in this they are again mistaken; for as I take it, a *Witness de auditu* is such a one who repeats at second Hand, as if Mr. May had deposed that another person had told him he had heard shooting. But since our Hearing is as much to be depended on, as our Seeing, in what concerns the proper Object of the Ear ; Mr. May's Testimony, which chiefly consists of what he heard and saw himself, is not in the sense of *Law de auditu*. Mr. May deposes he heard the shooting, and the next day that he came down, he saw the *Worcester* riding, with another Ship at her Stern, and that he saw some of the Crew come ashore in a Boat, and that they told him that they had brought in a Ship; and that *Coge Commodo*, or the *Linguister* told him he had bought the Ship; he saw and handled the *Black's* Wounds, he was Eye and Ear-witness to *Madder's* threatening, and imposing a rigorous Silence; In all this there is nothing properly *de auditu*, for that the Seamen told him they had brought in a Ship, did not depend barely upon their telling, but upon these Circumstances, that they were the persons brought it in, and that the Ship was riding under his Eye at the Stern of the *Worcester*, and just so what he heard from *Coge Commodo* and the *Linguister*, being upon the Place, and seeing the Ship under his Eye, is not to depone only *de auditu*, but has as much Evidence as is necessary to creat a full certainty in the mind of any reasonable and indifferent person.

As for the other Circumstances, I beg liberty to fore-warn you, *Gentlemen*; That every thing material is proven; and that even as to the least Circumstance, there is some Evidence; That the Goods were not regularly Marked, as is ordinar in fair Trade, is proven by the Oaths of Skippers; That the Seal of the *African Company* was seen in the hand of Captain *Madder*, is deposed by *Glen* a Seal-Cutter, who could not well be mistaken in a matter of that kind: And in like manner, that there was something aboard of the *Worcester* which would not be found, tho they should tear her Board from Board, is deposed by *James Wilkie*. None of these Circumstances are absolutely without Evidence: And the rest of the Libel, both what is essential, and even as to lesser Circumstances, is distinctly and plainly proven.

To conclude, *Gentlemen*, As, on the one Hand, you are to be very tender of admitting that for a Proof, in a Case of Life and Death, which ought not to be admitted; So you must be careful, not to reject such Evidence, as must convince the whole World, that these Unhappy Criminals are guilty of the Cruel and Atrocious Crimes lybelled. Take the Matter in it's whole Series, The Affected Darkness in the Entry to the Undertaking, a Correspondence in Cypher, wherein the Parties were neither to be mentioned on the Cover, nor in the Letters; nor were they to subscribe: That the Cargo was inconsiderable, and chiefly composed of Arms, not to the Value of 1000 Pounds *Sterlin*. And it seems almost ridiculous, that a Ship of 200 Tuns, with 20 Guns mounted, sailed by 36 Men, should be sent to the *East-Indies* upon an ordinary Adventure, with so Invaluable a Cargo; And joyn with that the Evidence of the Murder and Robberies mentioned in the Indictment. Consider how much Light the Providence of GOD has discovered in so dark a Crime, committed in a place so distant and solitary: And I am confident you will conclude with me, That the Murder and Piracy is proven.

The Advocats for the Pannels did also on their part speech the Affize, by resuming the Defences for the Pannels, and for taking off the weight of the Probation led against them, and by alledging what could be further said for their Exculpation and Defence: But these Speeches having been made *extempore & viva voce*, albeit the Advocats for the Pannels were desired at the printing

ring of this Process, to give in to be printed, a full Copy of what they had said in defence to the Assize, yet they declined to do the same.

The Judge of the High Court of Admiralty and Assessors, ordain the Assize presently to inclose, and to return their Verdict upon *Friday* next, being the sixteenth of *March* instant, at Ten a Clock in the Forenoon, and the haill fifteen Assizers to be present, each under the pain of three hundred Merks, and continue the Dyet till that time: And ordain the Pannels to be carried back to the respective Prisons.

ROBERT FORBES I. P. A.

CURIA JUSTICIARIA

Suprema Curia Admir-

ralitatis tenta in Pretorio, vel nova Domo Sessionis burgi de Edinburgo, decimo sexto die Mensis Martii 1705. per Judicem dictæ Curie, & per honoratissimos viros Joannem Comitem de Loudoun, Joannem Dominum de Beilhaven, Dominos Robertum Dundas de Arnestoun, Joannem Home de Blackadder, & Joannem Cockburn de Ormiston Assessores.

Curiâ Legitimè Affirmatâ.

The said day, the persons who past upon the Assize of Captain *Thomas Green* Commander of the Ship the *Worcester*, Captain *John Maddar* Chief-Mate of the said Ship, *John Reynolds* second Mate, *Thomas Linsteed* Assistant Supercargo, *James Burn* Boatwain, *James Simpson* Gunner, *Andrew Robertson* Gunners-mate, *John Bruckly* Seaman, *George Kitchen* Seaman, *Henry Keigle* Carpenter, *George Haines* Steward, *Samuel Wilcocks* Chyrurgeons-mate, *George Glen* and *Alexander Taylor* Seamen, *John Bannantyne* Seaman, returned their Verdict in presence of the said Judge and Assessors, whereof the Tenor follows.

Edinburgh the 14 *March* 1705, The Assize having inclosed, did choise Sir *James Fleeming* of *Rathobyres* to be their Chancellor, and *William Neilson* Merchant in *Edinburgh* to be their Clerk; And having considered the two Indictments pursued at the instance of Mr. *Alexander Higgins* Procurator-fiscal of the High Court of Admiralty, against Captain *Thomas Green* Commander of the Ship the *Worcester*, Captain *John Maddar* Chief-mate of the said Ship, *John Reynolds* second-mate, *Thomas Linsteed* Assistant Supercargo, *James Burn* Boatwain there, *James Simpson* Gunner, *Andrew Robertson* Gunners-mate, *John Bruckly* Seaman, *George Kitchen* Seaman, *Henry Keigle* Carpenter, *George Haines* Steward, *Samuel Wilcocks* Chyrurgeons-mate, *George Glen* and *Alexander Taylor* Seamen, *John Bannantyne* Seaman, with the Debate upon the saids Indictments, and the Judge of Admiralty and Assessors their Interloquitor and Explanation thereupon, with the Depositions of Witnesses adduced by the Pursuer thereintil; They by plurality of Votes find, that there is one clear Witness as to the Piracy, Robbery, and Murder libelled, and that there are accumulative and concurring Presumptions proven for the Piracy and Robbery so libelled: But find that *John Reynolds* second Mate of the said Ship was ashore at the time of the Action libelled. sic subscribitur

Ja. Fleeming Chancellor
Will. Neilson Clerk.

Thereafter Mr. *David Forbes* Advocat, produced an Procuratory from the Company of Scotland Trading to Africa and the Indies, to him the said Mr. *David Forbes*. In the Terms whereof the said Mr. *David Forbes* Protested, and took Instruments. The Tenor of both Procuratory and Protest is as follows, *Viz.* The COURT of DIRECTORS of the Company of Scotland, Trading to Africa

Africa and the Indies, Considering, That the Ship the Worcester and her Cargo is by Sentence of the High Court of Admiralty, found lyable by way of Reprisal to the said Company, for Reparation of the Damages sustained by them, through the wrongous Seizure of their Ship the Annandale, and the delay and denial of Justice in England concerning the same. Conform to the said Companies Process of Declarator of Reprisal, bearing a Conclusion of Roup and Sale of the said Ship the Worcester and her Cargo, for Reparation of the Companies said Damages, as the Judge Admiral's said Sentence, dated the third of March instant bears. And considering likewise, That the Additional Conclusion of the Criminal Indictment, raised at the instance of Mr. Alexander Higgins Procurator-fiscal of the said High Court of Admiralty, against Captain Thomas Green, late Commander of the said Ship the Worcester, and his Crew, for Piracy, Robbery and Murder, bears over and above the Confiscation of their Escheat, Moveables in general, That the said Ship and Cargo in Special should be likewise Confiscated to Her Majesties Use; The said Court of Directors Do therefore, by these Presents, Give full Power, Warrant and Authority to Mr. David Forbes Advocat to appear for them, and in their Name and Behalf, and in Behalf likewise of Mr. Rodorick Mackenzie their Factor in the said Process of Reprisal, to the behoof of the said Company, To Protest against the said Additional Conclusion of the said Criminal Indictment, with all that has followed, or may follow thereupon, that the same may not in the least prejudice the said Company of the Benefit of their Right and Interest in the said Ship the Worcester and her Cargo, as should accord. In Testimony whereof, these presents are by Warrant of the said Court of Directors, signed by their President for the time, and Counter-signed by the said Companies Secretary, at Edinburgh the twelfth Day of March, One Thousand seven Hundred and five Years.
Sic subscribitur FRANCIS SCOT. P. C. D.

By Order of the said Court ROD. MACKENZIE *Secretary to the said Company:*

Follows the PROTEST:

EDINBURGH, 16 March 1705.

I *The above Mr. David Forbes, Do hereby Protest in the Terms of the above Mandat, and thereupon I take Judicial Instruments in the hands of Mr. Daniel Hamilton, Clerk of Court, and require the Members of Court as Witnesses. Sic subscribitur*
 DAVID FORBES.

Her Majesties Advocat Protested in the contrair.

Which Protestations, The Judge of the High Court of Admiralty, &c. admitted and allowed them to be Recorded.

The Judge of the High Court of Admiralty and Assessors, Continue the Dyet till *Wednesday* the Twenty one of *March* instant at Ten a Clock in the Forenoon : And Ordains the Pannels to be carried back to the respective Prisons.

CURIA JUSTICIARIA Suprema Curia

Admiralitatē tenta in Prætorio, vel nova Domo Sessionis Burgi de Edinburgo, Vigesimo Primo die Mensis Martii 1705. per Judicem dictæ Curia, & per Honoratissimos viros Joannem Comitem de Loudoun, Joannem Dominum de Beilhaven, Dominos Robertum Dundas de Arnistoun, Joannem Home de Blackadder, & Joannem Cockburn de Ormiston Assessores.

Curia Legittime Affirmata.

Intran.

Captain *Thomas Green* Commander of the Ship called the *Worcester*.

Captain *John Madder* chief Mate of the said Ship.

John Reynolds second Mate of the said Ship.

Thomas Linsteed Assistant to the deceased Supercargo of the said Ship.

James Burn Boatswain of the said Ship.

James Simpson Gunner.

Andrew Robertson Gunners Mate.

John Bruckly Seaman.

George Kitchen Seaman.

Henry Keigle Carpenter of the said Ship.

George Haines Steward of the said Ship.

Samuel Wilcocks Chyrurgeons Mate.

George Glen Seaman.

John Bannantine Seaman in the said Ship.

Alexander Taylor Seaman.

The Judge of the High Court of Admiralty and Assessors, Having considered the Verdict of Assize returned against Captain *Thomas Green* Commander of the Ship called the *Worcester*, now in *Bruntisland* Harbour, Captain *John Madder* chief Mate of the said Ship, *John Reynolds* second Mate of the said Ship, *Thomas Linsteed* Assistant to the deceased Supercargo of the said Ship, *James Burn* Boatswain of the said Ship, *James Simpson* Gunner, *Andrew Robertson* Gunners Mate, *John Bruckly* Seaman, *George Kitchen* Seaman, *Henry Keigle* Carpenter of the said Ship, *George Haines* Steward of the said Ship, *Samuel Wilcocks* Chyrurgeons Mate, *George Glen* Seaman, *Alexander Taylor* Seaman, and *John Bannantine* Seaman in the said Ship, upon the sixteenth Day of *March* instant; Whereby it is found proven, that there is one clear Witness as to the Piracy, Robbery and Murder Libelled; And that there are accumulative and concurring Presumptions proven for the Piracy and Robbery so Libelled: And that *John Reynolds* second Mate of the said Ship was ashore at the time of the action Libelled; They in respect thereof, by the Mouth of *John Park Dempster*, Decern and Adjudge the said Captain *Thomas Green*, *John Madder*, *James Simpson*, *Henry Keigle*, and *George Haines* to be taken to the Sands of *Leith*, within the Flood-mark, upon the first *Wednesday* of *April* next, being the fourth Day of the said Moneth, betwixt the Hours of Eleven a Clock in the Forenoon and Four a Clock in the Afternoon, and there to be Hanged upon a Gibbet till they be Dead. And sick-like, Decern and Adjudge the said *George Glen*, *Alexander Taylor*, *Andrew Robertson*, and *George Kitchen*, to be taken to the Sands of *Leith*, within the Flood-mark upon the second *Wednesday* of *April* next, being the Eleventh Day of the said Moneth, betwixt the Hours of Seven and Twelve a Clock in the Forenoon, and there to be Hanged upon a Gibbet till they be Dead. And also, Decern and Adjudge the said *James Burn*, *John Bruckly*, *Samuel Wilcocks*,

Wilcocks, John Bannantine, and Thomas Linstead, to be taken to the Sands of Leith, within the Flood-mark, upon the third Wednesday of April next, being the Eighteenth Day of the said Moneth, betwixt the Hours of Eleven a Clock in the Forenoon, and Four a Clock in the Afternoon, and there to be Hanged upon a Gibbet till they be Dead; And Ordain all their Moveables, Goods and Geer, and particularly the Ship Worcester and Cargo to be Escheat, and in-brought to Her Majesties Use, Reserving to all Persons pretending Right to the said Cargo, or any part thereof, their respective Claimes and Pretensions to be insisted in and discust before the High Court of Admiralty as accords, which is pronounced for Doom; and Absolve the said John Reynolds.

JAMES GRAHAM I. P. A.

The Judge of the High Court of Admiralty and Assessors, Recommend to the Lords of Her Majesties Privy Council, to give a Reprieve to *Thomas Linstead* Assistant Supercargo of the Ship *Worcester*; And desire that their Lordships would Recommend him to Her Majesty for Her Gracious Pardon.

JAMES GRAHAM *In presentia Assessorum.*

Follows some Confessions and Declarations emitted by some of Captain Green's Crew, which are here set down according to their dates, and as they were freely made in the presence of the Persons therein mentioned, and are only here subjoyned not as any part of the Process, but for the further satisfaction of all that shall be pleased to Read the Premisses.

Edinburgh, 16th March 1705.

DECLARATION by *Thomas Linstead*, emitted in presence of *Sir James Stewart* Her Majesties Advocate, hereto subscribing with the said *Linstead*.

T *Thomas Linstead* Declares; That being in the Ship the *Worcester* as Assistant to the Supercargo, when the Vessel came to *Callicoilan* upon the Coast of *Malabar*, which was about the beginning of the 1703, *Mr. Hammond* and he were sent ashore to look after the Goods they had Sold and the Returns they expected at *Callicoilan* and *Keilon*; That the Ship the *Worcester* left *Callicoilan* with her Sloop in *January* 1703, for to go to *Callecut*, and other places up that Coast; But within five or six Days after the Ships parting, there came in Fisher Boats to *Callicoilan*, who told them that their Ship the *Worcester* had had an Engagement at Sea, and that it was the Sloop that first attackt the Vessel, and that they Fought until they were out of sight of the Fisher-men, who could give no further account of it. But thereupon the Declarant and *Mr. Hammond* Wrote, and sent a messenger either to *Cocbeene* or *Callecut*, to know what was become of the *Worcester*, and that they got a Return after some days, that they should mind their business, and not concern themselves with any thing that *Callant* the Supercargo did Aboard. That some days thereafter, the Declarant met with *Coge Commode* in the *beck*

of *Keilon*, who told him, that he had Bought a Ship, and he took the Declarant Aboard, that the Vessel was about 100 Tun, and did bear about twelve or thirteen Guns, and that she appeared to be of the Countrey Build. And *Coge Commodo* said, he had bought her from the Pirats of *Cota* or *Burgara*, which are two little Pirating Towns on either side of a River on the Coast of *Malabar*. But when the Declarant came to *Keilon*, the *Dutch* and *Portuguese* there told him, that that Vessel which *Coge Commodo* had Bought was brought in in the Night season by some of the Crew of the *Worcester*, and that her Top-mast was taken down, and her Sails taken off, and the Yards lowed; And that the *Dutch* and *Portuguese* made no more reckoning of it, because what is ordinary on that Coast. That the Declarant and Mr. *Hammond* stayed, for two or three Months after their parting from the Ship, at *Callicoiloan* and thereabout, until the Ship the *Worcester* came back to the Road of *Callicoiloan*, and that there he went Aboard: That when he went Aboard, he told them what he had heard, but they gave him no account of the Action; nor could he learn more of it. That the Doctor was ashore at *Ibeck* while the Ship was at Anchor at *Callicoiloan*, and that at that time the Declarant was gone up to *Callicoiloan*, and knows no more of the Doctors being ashore. That the Sloop with Mr. *Loveday* and others aboard did first come back to *Callicoiloan*, and advertised the Declarant and Mr. *Hammond* to be in readiness, for the Ship was coming back, and that when she came back they went aboard, and the Declarant went aboard at *Anjango*, from whence they sailed to *Bengall*. And this the Declarant declares to be a Truth. *Causa scientia patet.*

T. Linstead.
JA. STEUART.

Edinburgh, 27. March 1705.

IN presence of Mr. *James Graham* Judge of the High Court of Admiralty, *George Haines* one of the Crew of the *Worcester* being desirous to make a Confession of what he knew in relation to the Crimes for which he and the rest of the Crew were Pursued; Declared, That when the Ship the *Worcester* was in the Downs, the Declarant received a Letter from a Friend in London, telling him, that it was surmised in London that their Ship was going out upon some ill design, and that he had likeways another Letter from his Father to the same purpose, and heard the Gunner *James Simpson* say, he had also one of the same nature. The Declarant Declares, that thereafter he used all his endeavours to get ashore, and accordingly he having got leave to see some Friends aboard the *Fleet Frigate* that was then riding in the Downs, he got into her Long-boat that was then going ashore, but some of the *Frigate* Crew having got notice where the Declarant was, after he went ashore, they came to him, and having drunk with him to some pitch, perswaded him to go aboard of his own Ship again, and the Declarant was accordingly carried aboard in one of the Boats belonging to the Town of *Deal*. And sometime thereafter, the Declarant designed likeways to have got into a Man of War, riding hard by their Ship, but Mr. *Callant* the Supercargo came after him and brought him back, and the Declarant believes the Name of the Man of War was the *Salisbury*. That the Ship *Worcester* sailed from the Downs the 8th March 1702 in the Morning; That in the Moneth of June or July thereafter, the Ship arrived at *Delagoa*, where their Sloop was built of Timber and other materials which they had brought from England aboard the Ship: That having sailed from *Delagoa*, some few days before they came upon the Coast of *Malabar*, he heard some of the Crew, and particularly *John Bruckly* the Cooper talk of turning Pirats, and perswading others of the Crew to go in with them; That when they came upon the Coast of *Malabar*, and had been there

there about a Moneth, they endeavoured to take a large Countrey Boat, and for that end, the Sloop endeavoured to get betwixt the said Boat and the Shore, that so the Ship might come up with the said Boat, but there being several hands aboard, and the Boat having fifty Oars, out sailed both Ship and Sloop, and got off. *Declares*, that *Cogè Commodo* was aboard the Ship the time of the foresaid Chase, and that he drew his *Sabre* and encouraged the Crew of the *Worcester*. *Declares*, that thereafter, the Ship and Sloop sailed for *Cochenee*, with a design to have cleaned both, at that Place; (the Sloop being much spoilt with Worms) but the Governour would not allow them to be cleaned there, and therefore they went up to *Callecut*, where the Sloop was cleaned and refitted, and Manned with about eight Men and two Guns, two Patteraroes, other small Arms and Ammunition put aboard, and then the Sloop alone sailed up towards *Tillicherry*, and stayed away from the Ship about eight days. *Declares*, that the Sloop took no Goods along with her when she went out, but when she returned, she had aboard eight Hogsheds of *Rack*, and knows not how she came by them, but *John Roberts* one of the Crew who had been with the Sloop at that time, was very melancholy after his return, and the Declarant having a *Cocco-nut* full of *Rack* in his Hand, desired *Roberts* to take a part, but he would not, and went down to his Hammock mightily concerned, and afterwards told the Declarant, that the Reason of his Concern and Melancholy was, that he was accessory to the cutting off of some Mens Heads at *Sacrifice Rock*, betwixt *Tillicherry* and *Callecut*. *Declares*, that the Sloop did sail by her self from *Callecut* thereafter, and the Ship followed down to *Callicoilan*, and did there meet with the Sloop, and having discovered a Ship coming as from the southward, the Sloop was under sail, and made to get in betwixt the said Ship and the *Offing*, that so she might not get to Sea, and the Ship coming nearer to the *Worcester*, in which the Declarant was at the time, the *Worcester* slipt her Anchors, and made towards the foresaid Ship, and at length came up with her and fired a sharp Shot, to cause her come to, which she did accordingly, by bracing her Head-sails back to the Masts, and that thereafter she was boarded. *Declares*, that the Ship was about seventy Tuns Burden, and square-sterned, and painted in the Quarters with Reid and Yellow, and that she had a main Deck, and a quarter Deck, and a little Fore-castle, and was of the *Indian* Build, and that there was in the Ship when boarded about 12 or 14 Men all White, and sickly, as the Declarant clearly perceived before the Ship was boarded, but when the Declarant was endeavouring to know of what Countrey the Men were, *Edward Carry*, one of the *Worcesters* Crew knock't him down with a Hand-spake into the Midship Hatch, but he afterwards heard amongst the Crew, that the Men of the taken Ship were *Britans*. *Declares*, that he knew not what became of the Men which were aboard of the taken Ship, not having been able to come above Deck, with the Stroke which he received from *Edward Carry*, and whereof he yet bears the Mark, but declares that the Sloop went off before she came above Deck, and stayed away for three or four days, and that the Declarant thereafter heard the Men were put into the Sloop, and what was done with the said Men of the taken Ship he cannot tell, but doubts not they were murdered and made away, because they could not be put ashore at any place at hand on that Coast, there being *English* and *Dutch* Factories all amongst the Coast, very near each other. *Declares*, that these of the Crew who went with the Sloop from the Ship at that time, were Mr. *Loveday*, *Thomas Calcute*, *Andrew Robertson* Gunner of the Sloop, *John Roberts*, *Edward Carry*, *Duncan Mackay* and *Alexander Taylor*, and *Antonio Ferdinando* the Black, but cannot be positive who besides were there. *Declares*, that the next Evening after the Action, the Ship which was taken the day before, was carried in by some of the Crew to *Callicoilan*, and sold to *Cogè Commodo* for 1500 *Rupies*, and that the Goods of

the said taken Ship were some Balls and Matts of *China-Roots*, and four Chests of Copper, which Chests were sold afterwards at *Bengall* to a *Bunnion* Merchant named *Tagodas*. Declares, that some days after the Action, the Declarant was sent ashore with a Letter to the *Supercargo*, and that he then heard that *Coge Commodo* to whom the Ship was sold, was a great Assister of all Pirats, and was very serviceable to *Kid* and *Evorie* when upon that Coast, and bought of their Goods, as the Declarant was credibly informed of the People on that Coast; and declares that the time the Declarant was on shore, the *Supercargo*, Mr. *Linstead*, *Reynolds*, *Hammond* and the Doctor were ashore; and the Declarant did likewise see *Antonio Ferdinando* the *Black* at the *Ibeck* of *Callicoiloan*, who complained of a Wound in his Arm. Declares, that after the Action, and before the Declarant went ashore, the Doctor *Charles May* came aboard from the *Ibeck* of *Callicoiloan*, and seeing the Chests which had come out of the taken Ship upon the Deck, he asked Captain *Madder*, what did all that Lumber upon the Deck, and that *Madder* answered him with a Curse, and told him to mind his *Plaister Box*, and ask no Questions. Declares, that while the Ship was upon the Coast of *Malabar*, she sprang a Leak in the Strake next the Keel, which made the Crew to pump constantly; however they went not in to any Place upon the Coast of *Malabar* to refitt her, but sailed to *Bengall*, which was about five Weeks sailing, and there the Ship was refitted, not only of the Leak, but of an Hurt which the Ship got in the Action, in the Plank, betwixt the Midships-scrupper and the Chestree, and a new Plank put in, in the Larboard-side where the Hurt was. Declares, that the Declarant did keep a Note by way of Journal during the Voyage, which contained the Substance of what he now declares in relation to the above Particulars; And that when the Ship was seized in the Road of *Leith*, he heaved the same over-board, lest it should have fallen in the Seizers Hands. Declares, that he would have emitted this Declaration and Confession sooner, but that he was always made believe by Captain *Green's* Agents, that the Defences made for the Crew would certainly bring them off, and if they did all agree in one Mind, and keep close Months, there would be no fear, for nothing could be otherways proven that could do them Harm. And declares, that *Wilcocks* the Chyrurgeons-mate told the Declarant, that he saw a Letter from the Ovyners of the *Worcester* in *London* to Captain *Green*, vvhich bore; That altho' the Crew were condemned in *Scotland*, they had Pardons ready to send down for them: And this the Declarant vvas likewise informed of from the Carpenters Wife.

George Haines.
JA. GRAHAM.

Edinburgh 28 March 1705.

IN presence of Sir *Robert Forbes* Judge of the High Court of Admiralty, Compeared *George Haines* one of the Crew of the Ship the *Worcester*, and Declared that he now adds to his former Declaration; That after the Ship therein mentioned was seized, he saw the Men which were therein, killed and murdered with Pole-Axes and Cutlices, and saw their dead Bodies put into the Sloop, and thereafter thrown over-board, and to the best of the Declarants knowledge, the said Men so killed were *Scots Men*, the Declarant having heard them speak the *Scots* Language. And further Declares, that the said Ship then seized was understood by the Crew of the *Worcester* to have been Captain *Drummond* his Ship, and particularly he heard Captain *Madder*, *John Bruckly*, and the deceast *Edward Carry* say so. And further adds, that he would have emitted what is above before this time, but was afraid lest his men-

mentioning the Ship so seized to belong to Captain *Drummond*, and the Men aboard of the same to have been murdered, might have rendered the Government offended, and obliged them to deal hardly with the Declarant. And this he declares to be Truth as he shall answer to God.

George Haines.
ROB. FORBES.

Edinburgh 31. March 1705.

IN presence of Mr. *James Graham* Judge Admiral, *John Bruckly* Cooper of the Ship *Worcester*, being desirous to make a Confession of the Crimes whereupon he and the rest of the Crew were pursu'd; *Declares*, that some time after the Ship the *Worcester* came upon the Coast of *Malabar*, that she and the Sloop gave Chase to a Countrey Boat, which escaped by reason of her Oars. That afterwards the Ship and Sloop sailed in Company to *Cocheane*, where they were denied Access to clean, and therefore they thereafter sail'd to *Callecut*, where the Sloop (which had been spoil'd by the Worms) was hal'd upon the shore, and clean'd, and thereafter was mann'd with about 10 Men, and 2 Guns, two Patteraroes, with other small Arms put aboard. From *Callecut* the Sloop was ordered to sail towards *Tillicerry*, but there was no Goods sent along, and in about 6 or 8 days thereafter the Sloop came back, in chase of another Ship. *Declares*, that when the Ship the *Worcester* saw the Sloop in chase of the other Ship, she slip't her Anchors, and made out to Sea to meet them; *Declares*, that he saw the Sloop board the said Ship towards Night, and that the Long-boat was after ordered to be mann'd, and Captain *Madder* went along in the Long-boat. *Declares* he does not know what became of the Men who were on board the taken Ship, but that the Declarant did see they were White Men; And the Reason why he knows not what became of the Men is, that the Declarant was never on board the taken Ship, and that the Sloop which had boarded the Ship, was ordered away next Morning, and he doubts not but the Men were amongst which were taken out of the Prize-ship. *Declares*, That the Ship which was taken, was mann'd with some of the *Worcesters* Crew, and sailed along with the *Worcester* till they came to *Callicoilan*, where they found the Sloop. *Declares*, that whilst the *Worcester* with the other Ship came in sight of the Sloop, the Sloop weigh'd Anchor and stood to the Offing, so that the taken Ship came in to *Callicoilan* betwixt the Sloop and the *Worcester*, and all three came to an Anchor together. *Declares*, that after they came to an Anchor, the taken Ship rode under the Stern of the *Worcester*, and was thereafter sent in to *Callicoilan* River, and sold to *Coge Commodo*, as the Declarant supposes. *Declares*, that thereafter the Declarant was set a shore for Water to the *Ibeck* of *Callicoilan*, where he met with Dr. *May*, and that he sent on board a *Pinguetta* with Water according to his Orders. *Declares*, that sometime after they came to an Anchor before *Callicoilan*, and before the Declarant was sent ashore for Water as above, they saw a Ship at Sea coming from the Southward; that the Sloop was under Sail at the time, being a cruising about; that she sailed towards the Sea, and bore down the Ship towards the *Worcester*; That the *Worcester*, when the Ship came near, slip't from her Anchors, and made towards the Ship, which thereafter was boarded, first by the Sloop, and then by the *Worcester*, about ten or eleven a Clock in the Forenoon. *Declares*, That there was both Whites and Blacks on board that Ship, and most part Whites, but the Declarant did not know what became of them; but that the

Sloop went off in a few Hours after the Engagement, and did not return till after two or three days. That the Declarant does not know what became of that Ship; but *Declares*, that he was in a *Moorish Kings House* with about six of the Crew, and that that King was *Coge Commodo's* Master, who had bargained for one of the taken Ships, the Declarant cannot be positive which; And that at the same time the *Supercargo* who was along with them, presented the King with a small Fowling-piece. *Declares* that the Declarant stayed ashore trimming the Casks for about six Weeks thereafter, and does not remember at present any more of the Affair, and *Declares* he cannot sign but by this Mark.

X.

JAMES GRAHAM

Edinburgh, 3. April 1705.

IN presence of Sir Robert Forbes Judge of the High Court of Admiralty, Compeared John Bruckly one of the Crew of the Ship the *Worcester*; And *clares*, That he adheres to his former Declaration emitted before Mr. James Graham Judge Admiral the 31 of March. And now adds, that the Men which were aboard the Ship which was Seized before *Callicoiloan* were for the most part *White Men*, and the Declarant heard them speak the *English Tongue*, being in number about Twelve or Fourteen; And *Declares*, That Captain *Madder* was in the Sloop, and one of those that boarded the said Ship, and that the Men were put into the Sloop, and carried away to the Northward in the Sea, and the Declarant never heard any more of them: And that the Goods Aboard the taken Ship were brought into the Ship the *Worcester*, and consisted of *China Root*, and four Chests of Copper, which Chests were Sold at *Bengall* to a *Banzion Merchant*. And further adds, That the Men seized in the taken Ship were Killed, after they were put into the Sloop, and before they were carried to the Sea Northward, as the Declarant supposeth. And further adds, That immediatly after the Action was over, the Declarant did hear the *Supercargo Callant*, Captain *Madder*, *John Roberts*, and *Edward Carry* say, That the seiz'd Ship was Captain *Drummond's Ship*, belonging to the *Scots African Company*: And adds, That, when the *Worcester* sailed from the *Downs*, the Declarant did not know where the Ship was bound, but heard it frequently said, they were going upon a Discovery. And *Declares*, This is the Truth, as he shall answer to GOD; And *Declares*, he cannot Write, but by this Mark.

X.

ROBERT FORBES.

APPENDIX

APPENDIX.

THE foregoing Account of the Trial of Captain *Green* and his Crew, being taken clofly from the Records of Court, and the usual Form of the Court being to Hear and Discufs Objections against the Witneffes, before they be Examined, *viva voce*, without any written Debate; It is therefore thought fit here to add the Objections that were made against the Witneffes, and the Answers given thereto; with the Interloquitors paff thereon; that there may be nothing wanting to the Readers full Information.

And first, It was Objected against *Antonio Ferdinando* the Cooks Mate, that he could not be a Witnefs, becaufe of his Poverty, he not being worth (as the Style of the Court is) the *Queens Unlaw*, that is Ten Pounds *Scots*, in cafe he should transgreff. And fo according to the Law of this Kingdom was to be rejected. 2. That he was not a Christian, and therefore could not be received as a Witnefs against Christians, fpecially in a Purfuit that reached their Lives and Fortunes; Nor could he indeed be fupposed to have the juft Knowledge of the Religion of an Oath.

To which it was Answered, 1. That tho' the Standard of ten Pound *Scots*, fettled by the Law and Custom of this Kingdom, as to the Quality of Witneffes, might well be refused in a Trial of Crimes of this nature against the Law of Nations, and which were to be tried accordingly; Yet the matter of Fact was falfe, *Antonio Ferdinando* being worth more than ten Pounds *Scots* by the very Wages due to him, and which, by the Pannels own Books, were attested to be fifteen Shillings *per Menfem*, whereof, to this Hour, he hath got no Payment. 2. *Antonio Ferdinando* was a Christian, as he himfelf owned from the beginning, and that he was Born of Christian Parents; Likas its known, that fuch Names are only given to Christians: Befides, tho his not being a Christian might be a *prejuge* against him, yet it could be no juft exception against his Testimony as a Witnefs, fince he both profest the knowledge of GOD, and the Confcience of an Oath, as he had often declared.

The Judge and Affeffors having confidered the forefaid Objections and Answers, they repell the Objections, in refpect of the Answers, and allows the Witnefs to be admitted.

2. It was Objected against *Antonio Francisco*, that he was not worth ten Pounds *Scots*, and had indeed nothing, befides, that he was no Christian, but a Servant or Slave to Captain *Green*, and alfo had no Religion.

To which it was Answered; 1. That tho ten Pound *scots* be the Rate of Witneffes in our *Scots* Law, yet, as hath been faid, this Rule cannot vie in the cafe of the Crimes libelled, committed against the Law of Nations in remote parts, *et in alto mari*, which made the Crimes to be Crimes excepted; And its known to be the Rule and Priviledge as to Crimes atrocious and occult, and therefore excepted to exempt even the Witneffes from the ordinary Qualifications: Nor was *Antonio Francisco* to be reckoned no Christian, fince, 1. He bears a Christian Name, and next declares, that a Christian Miftress he had in

Fegu, who gave him to Captain *Green*, did first procure him to be Baptized and Christened. And, 3. He professes the Knowledge of the true GOD, nor, being a Christian, can he be reckoned any longer a Slave.

But, upon the whole, as to these two, and the whole other Witnesses, the Nature of the atrocious Crime against the Law of Nations, with the manner of their having been committed, and the Endeavours used for their Concealment, ought principally to be remembered; Since thereby, in the Opinion of all Lawyers, they become Crimes excepted: And that it is the known Priviledge of Crimes excepted, to relax from the ordinary Rules, and to proceed on such Evidence, as the Matter doth afford, the Substance of a Probation being only observed.

The Judge and Assessors having considered the foresaid Objections and Answers, they repel the Objections, in respect of the Answers, and allows the Witnesses to be admitted.

3. It was objected against *Anne Seron*, that she could not be a Witness, because a Woman.

To which it was answered, that in Crimes where the Probation proceeds not upon *Testes requisiti*, but such as Providence offers, even Women are admitted. But, 2. Its the General Opinion and Practice over all, that in Crimes atrocious, occult and excepted, a Woman is never refused.

The Judge and Assessors having considered the foresaid Objection and Answer, they repel the Objection, in respect of the Answer, and allows the Witness to be admitted.

Excerpts out of the Instructions and Letters found in Captain Green's Books, to which Sir David Dalrymple's Speech to the Jury relates.

IN the Instructions or Orders given by the Freighters of the *Worcester*, Captain *Thomas Green* Commander, to Mr. *Robert Callant* Supercargo, there occurs one Article in these Words,

We would have you Write us by all Opportunities, especially from Sinde, by any Ships bound from thence to Persia; And for the greater Secrecy, especially of the Letter to be sent to Mauritius for us, hereunder is an Alphabet for you to Write us by; Your Subscription must be in common English, Directing all such Letters to Captain Thomas Bowrey in Well-clofs-Square, London.

(*Nota*, At this place the whole Alphabet is insert distinctly, and above each Letter a different Character is set down, to be used in place of the Letters of the Alphabet.)

When your Cargo for England is provided or near completed, then we would have you Sell the Sloop for what you can get, and invest the Produce in Goods for England.

And lower amongst the same Orders in another Article are these words,

You must engage the Master of the Sloop not to let any Letter from himself or any other be sent to England, but only our Letter, in which you may insert the Names

Names of any Dead; And for the care and secrecy of those who go in the Sloop, in case no Letter or News comes to England, but our Letter concerning our Business, then we will on the return of the Ship give the Master and Crew one Months Pay Gratis, and they shall also have their shares of the Benefit promised the Ships Company for the Whale Fishing.

By a Letter dated London, 3 February 170¹, from Captain T. B——y to Mr. Callant, the said Captain advises him in these Words,

For the greater Security of our Affairs, when you Write by the Alphabet in your Instructions, I would have you carry the last Letter of each Word to be in the room of the first Letter to the next Word, as for Example,

Captain Thomas Bowrey, Sir wee are all well.

Captai nthoma showre yfi rwe ear eal lwel.

make no Title (as is usual) to begin your Letter, nor no Date, nor Compliment, no Name at last; But let all be comprehended in the Lines of your Letter, so as to make no distinction, and make but one Paragraph of all your Letter, and if any Men dead, set their Names immediatly after your own Name subscribed to the Letter, all in Characters before directed, and please to keep this as Directions therein.

By another Letter from the said Captain T. B——y to the said Mr. Callant dated London 16 February 170¹, he adds concerning the foresaid Cipher in these Words,

On further Consideration, I think, I have committed an Error in my Letter to you Yesterday, it being Wrote in it as viz.

Captai nthoma showre yfi rwe ear eal lwel.

That is, Captain Thomas Bowrey, Sir wee are all well.

Now, I doubt the naming any Name in the beginning, or making any Compliment there, may be a means to find the Key of the Alphabet, therefore pray strike out of the Letter I sent you Yesterday, as above done, and begin directly with your Business, following the Directions given you. And whereas you are ordered to direct said Letter to me, I would not have you mention my Name in the Subscription, but direct said Letter to Mr. Nicholas Pope Scrivener in Nicholas Lane, London, to pay 5 lib. to the bearer as in your Instructions.

Exc. EHR

F I N I S:

By a letter dated 1st March 1870, from Captain E. B. ...

[illegible]

I have the honor to acknowledge the receipt of your letter of the 11th inst. and in reply to inform you that the same has been forwarded to the proper authorities for their consideration. I am, Sir, very respectfully,
 Your obedient servant,
 J. B.

On further Consideration, I think I have committed an Error in my Letter to you respecting it being Written in it or viz.

Now, I should be naming my Name in the beginning, or making any Compliment there, may be a means to find the Key of the Alphabet, therefore pray strike out of the Letter I sent you yesterday, as above done, and begin directly with your Name, following the Direction given you. And whereas you are ordered to direct said Letter to me, I would not have you mention my Name in the Subscription, but direct said Letter to Mr. Nicholas Pope Secretary in Nicholas Lane, London, to pay 2 lib. to the bearer as in your Instructions.

FINIS